TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 141.

SARA GALLARDO Y SEARY, ESTEFANIA VARONNE, CELESTINA GALLARDO Y VARONNE, AND EVA GALLARDO Y VARONNE, APPELLANTS,

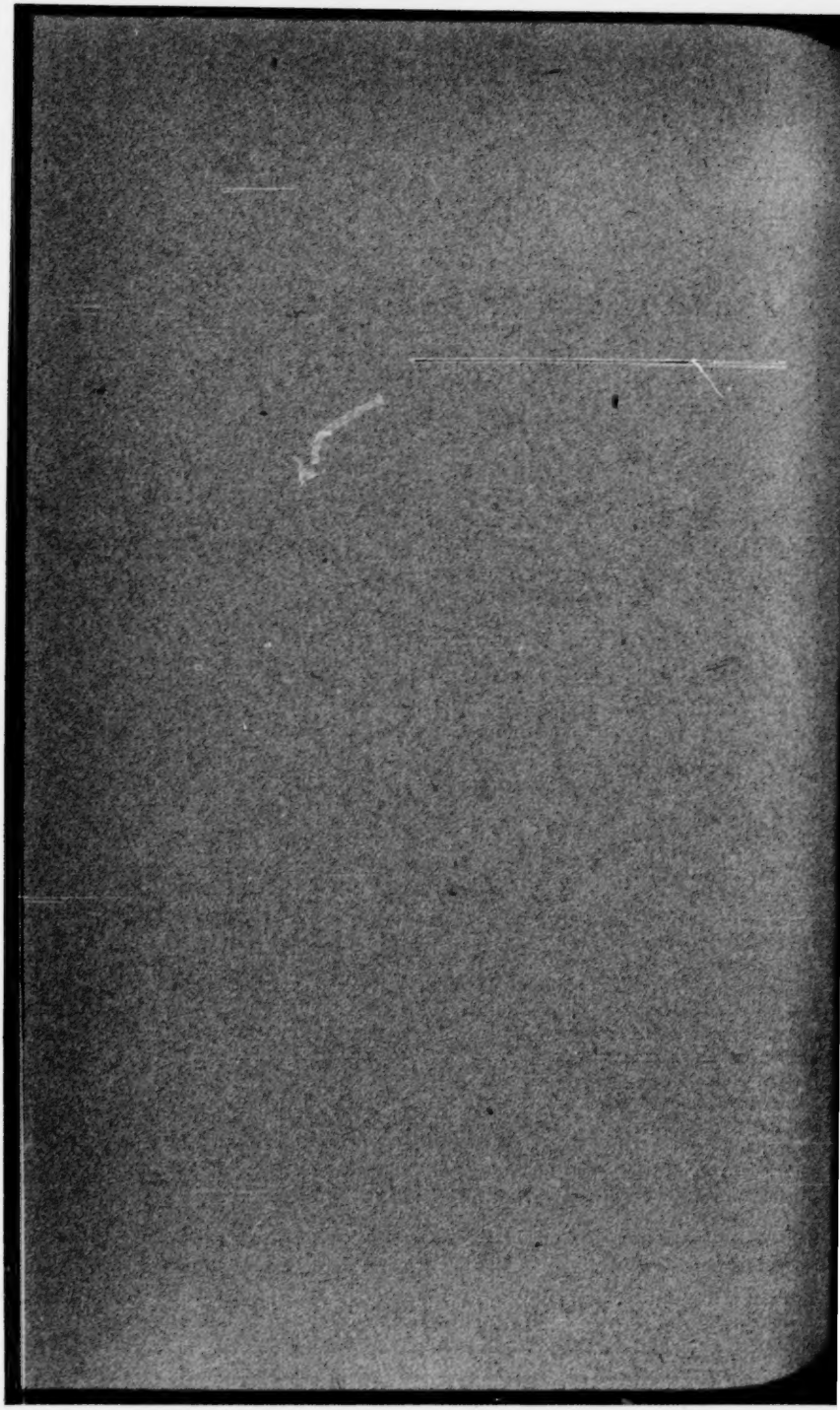
vs.

JAMES R. NOBLE, WILLIAM D. NOBLE, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

FILED APRIL 9, 1915.

(23,617)



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1 In the District Court of the United States for Porto Rico.

Filed January 9, 1908.

To the Honorable Bernard S. Rodey, Judge of the United States District Court for Porto Rico, in chancery sitting:

Josefa Ruiz de Noble, James R. Noble, William D. Noble, Sara Isabel Noble de McCormack, Arthur H. Noble, Josefa B. Noble and Maria T. Noble, who are all aliens and subjects of the King of England, bring this their bill of complaint against Eliza Gallardo y Seary, Estefania Varonni, Celestina Gallardo y Varonni and Eva Gallardo y Varonni, defendants, who are citizens and residents of Porto Rico.

And thereupon your orators aforesaid complain and say: That during and prior to the year of our Lord 1865 one Ramon Ruiz Gandia, since deceased, was the owner of an undivided interest in a certain sugar estate or plantation in the jurisdiction of Loiza in the island of Porto Rico, called "San Jose Cacique," and was at the same time in possession and control of the whole of said plantation by virtue of a lease of the remaining interest therein from his co-owners, Doña Amalia Seary, Don Ricardo Gallardo and Don Jorge Seary, and so remained during the time of the continuance of the contract of refaccion hereinafter set forth.

Your orators further allege that on the 22nd day of December, A. D. 1865, the said Ramon Ruiz Gandia executed in favor of the ancestor of your orators, William Noble, before the Public Scrivener, Jóse Celestino Schroeder, a deed of acknowledgment of a mortgage lien, wherein it was stated and admitted that, as a result of an accounting had between said Ramon Ruiz Gandia and said William Noble, the former was indebted to said Noble in the sum of
2 16,186 escudos of the money then in circulation, which was the equivalent of $8,093, for the support and refaccion of said plantation from the year 1863 to that time, which said Ruiz was unable then to pay on account of the failure of the crops; that he thereby agreed to pay said indebtedness from the proceeds of the first corps made after the first of January of the following year, after deducting the proportion necessary for current expenses of the plantation; and that for the security of such payment said Ruiz in addition to the general lien upon all his property which the law then gave for such debts granted a special mortgage not only upon the products of the next crop but upon all following crops until said mortgage debt was wholly extinguished and stipulated that said deed should be recorded in the then registry of mortgages so that it might have all its legal effects as such a lien; all of which will more fully appear from a true and correct copy of said deed which is herewith filed marked "Exhibit A" and prayed to be taken as a part of this bill of complaint, together with a correct translation of the same into the English language.

Your orators further allege that the said provision contained in

said deed providing for its registry in the then existing book of Mortgages was made in pursuance of the law then in force in Porto Rico to the effect that such indebtedness should be liquidated as to its amount by public document which might, when so liquidated, be recorded and should thereupon become a lien upon the land therein described and against which it was so recorded; and that, in pursuance of said law, the said deed was so recorded in the old "Anotaduria," in book 20, folio 7, No. 11.

Your orators further allege that said plantation "San Jose Cacique" at that time consisted of eight hundred and thirty-eight cuerdas of land within the barrio of the town of Loiza, having thereon two dwelling houses and various buildings composing a sugar factory, and was described at that time as bounded as follows:

3 on the North, by the settlement called Las Cuevas and the farms of the Mediania belonging to various owners; on the South, by the lands of Ricardo Gallardo, of Pablo Ubarri and of Antonio Garcia Revollego; on the East by the lands of Cecilio Lopez and of said Pablo Ubarri; and on the West by the Rio Grande de Loiza and other lands of the same Gallardo.

Your orators further allege that thereafter and about the year 186- the said Ramon Ruiz Gandia, being unable to pay his debts, was declared a bankrupt; and that afterwards, upon a settlement of the bankrupt estate, the above mentioned Ricardo Gallardo, one of the co-owners in said plantation with said Ruiz, acquired title thereto, but subject to various liens in favor of different persons and among them the lien of said William Noble as hereinbefore set forth; that thereafter said Gallardo obtained from the proper court a possessory title as owner of said plantation and, upon applying for the registry of said title in the year 1882, he was required to recognize as valid liens and agree to pay all such liens as appeared against said plantation upon the books of the old Registry, among which was the lien hereinbefore described; and that the validity and existence of said indebtedness and its lien upon said plantation was so recognized by said Gallardo, as appears duly noted in said Registry in Book 2 of Loiza, folio 2, estate No. 48, first inscription.

Your orators further allege that neither the principal sum of the indebtedness hereinbefore described, nor any part thereof, nor any interest thereon, was ever paid to said William Noble in his lifetime nor to anyone in representation of heir heirs since his death, but that the whole amount thereof still remains due and unpaid and, with its interest, constitutes a mortgage lien upon the said plantation "San Jose Cacique" as above described; and that said Notarial Deed

4 marked "Exhibit A" and containing the conclusive proof of the continued existence of said indebtedness and lien was duly presented in the present Registry on the 9th day of April, A. D. 1906, as appears from the indorsement of the Registrar thereon.

Your orators further represent that the said William Noble died, leaving a last will and testament under the provisions of which, and of the partition of inheritance made thereunder, your oratrix Josefa Ruiz de Noble, who is his widow, and the remaining complainants,

who are his children, are jointly interested as his heirs as owners of the indebtedness hereinbefore described.

Your orators further represent that the said Ricardo Gallardo remained the owner of said plantation until his death, at which event he left two children, the defendant Eliza Gallardo y Seary and Felix Gallardo y Seary; that the latter has since died leaving as his heirs a widow, the defendant Estefania Varonni, and two children, the defendants Celestina and Eva Gallardo y Varonni; and that said defendants to this bill of complaint are now in possession and enjoyment of the plantation above named as heirs of the said Ricardo Gallardo, claiming to be the joint owners thereof.

Your orators further allege that in the year 1883 and during the lifetime of said Ricardo Gallardo the latter executed a further Notarial instrument wherein he recognized the validity and existence of the said indebtedness hereinbefore described and of the lien thereof upon said plantation; and that by said repeated recognition of the same the running of the statute of prescription has been interrupted, and therefore said indebtedness and the right of complainants to foreclose their lien therefor upon the plantation "San Jose Cacique" aforesaid is a valid and subsisting right, of which your orators may, and do hereby avail themselves in this court of equity where matters of such character are peculiarly cognizable.

Forasmuch, therefore, as your orators can have no ade-
5 quate relief except in this court of equity, and to the end that the above named defendants may, if they can, show why your orators are not entitled to the relief hereby prayed, and may be required to make answer to this bill of complaint—but not under oath, the answer under oath being hereby expressly waived; that the amount now due to your orators, as the heirs of said William Noble, for principal and interest upon the indebtedness set forth and determined in said document marked "Exhibit A" may be fixed and decreed by, or under the authority of, this honorable court; that the amount, when so fixed, may be decreed to be a lien upon said plantation "San Jose Cacique" and foreclosed as such in this suit; that, in default of the payment to complainants of whatever amount may be so decreed to be due, within a short day to be fixed by the court, said plantation may be decreed to be sold at public auction to satisfy the same; that, in case of such sale, the defendants herein and all persons claiming through and under them since the commencement of this suit, and all other persons though not parties to this suit, who have or claim any liens of any kind upon said described premises subsequent to the recording in the old registry of the lien under said contract, may be barred and foreclosed of all right or equity of redemption in said premises; and that your orators may have such other and further relief in the premises as equity may require and to your Honor may seem meet;

May it please your Honor to grant unto your orators a writ of subpœna in chancery, directed to the said Eliza Gallardo y Seary, Estefania Varonni, Calestina Gallardo y Varonni and Eva Gallardo y Varronni, defendants herein, commanding them, on a day certain therein to be named and under a certain penalty therein to be expressed, to be and appear before this honorable court and then and

there full, true, direct and perfect answer make to this bill of complaint, and stand to and abide by such orders and decree as the court may make in the premises.

6 And your orators will ever pray etc.

(Signed) R. H. TODD,
" N. B. K. PETTINGILL,
Solicitors for Complainants.

7 In the District Court of the United States for Porto Rico.

Filed January 22, 1908.

Translation.

Number One Hundred and Fifty-six.

Mortgage Obligation.

In the town of Naguabo, Province of Porto Rico, on the 22d day of December, 1865, before me, the undersigned public scrivener of this district and before the witnesses to be mentioned, there appeared Don Ramon Ruiz, a resident of Loiza, of whose acquaintance I hereby certify, and stated: that by a liquidation made on this date between himself and Mr. William Noble, a property owner of this district, it showed that the former owed the latter the sum of Sixteen Thousand one Hundred and Eighty-six Escudos (8093 pesos) which he has been supplying him up to this date since the year 1863 to the present inclusive for the payment of the lease on the "San Jose Cacique" Estate, situated in the aforesaid town of Loiza, and by reason of not being able to grind the crop of this last year, for causes not unknown to Mr. Noble, he has not been able to pay off said account; therefore, and wishing to carry into effect this agreement in the way and form more suitable in law, he states: that he acknowledges and confesses to be real-y and effectively the debtor of the above mentioned Mr. William Noble, in the above mentioned sum, for the reasons given. And in as much as the delivery of the money is not made in my presence for the aforesaid reasons, the receipt thereof being true, he hereby renounces the exception of money not counted, of the new law, title one, fifth partida, which refers to same, and the two years granted by the same law to present said exception, which he hereby grants as if they had ellapsed. He therefore binds himself to pay the above mentioned sum to his

8 creditor Noble, with the proceeds of the first crops which may be ground from next January thereafter at the said San Jose Cacique Plantation; and there resulting from the liquidation made by the appearing party hereto, Ruiz, with Mr. Jose Rufino Goenaga in November last, that the former was indebted to said gentleman in the sum of two thousand Escudos (1,000 pesos), this must be paid during the month of October of next year 1866, thereby being cancelled that deed of refaccion, and Ruiz obliged not to execute any other agreement or deed with damage to this present one

wherein there will be annulled and without effect whatever, that which he may execute in the future; this without prejudice of deducing also the ordinary and indispensable expenses for the maintenance, and development required by the said Plantation by reason of the necessary refaccion and other expenses. For the better security of the aforesaid, besides the general obligation which he hereby makes of all his property hindering the special obligation, neither the special hindering the general, the appearing party hereto mortgages expressly and especially not only the canes which may be ground in the next crop by the "Cacique" Plantation, situated in the jurisdiction of Loiza as aforesaid, but also those which it may grind in the following crops until the complete payment of the amount herein acknowledged; allowing that the opportune annotation be taken of this instrument by the Register of Mortgages of this district, within the legal time of thirty days, of which obligation and its effects, I the Scriverner notified the parties hereto.

To the fullfilment of all that has been set forth in the present deed, the appearing party hereto affects his present and future property, with the clause which allows the courts to have same executed, executory contract, submission and renouncing all laws and rights in his favor, as well as that which prohibits the general law as to form.

9 It was thus stated by him and he signed same, being present witnesses and residents herein Don Roque Diaz, Don Joaquin Porrata and Don Ramon Muñoz, of all of which I hereby certify. Signed: Rn. Ruiz Gandia—Scrolled: Jose Celestino Schroder. Public Scriverner.

Mr. Antonio de Aldrey y Montolio, Notary of the Island of Porto Rico, General Keeper of the Records of Protocols of the District of Humacao, with domicile, residence and open office in this City, do hereby certify:

That the preceeding is a true and faithful/ copy of the original document which is to be found in the Protocol of this Notarial office under my charge.

In witness thereof and at the request of Mr. William D. Noble, I issue the present copy to which I attach my mark, signature and scroll on two sheets of Notarial paper of my use, as well as a fifty cents stamp, as provided by the Hollander Bill, leaving an annotation as to the issuing of this copy, at Humacao, Porto Rico, August 4, 1905.

(Signed) ANTONIO DE ALDREY, *Notary.*

There is a 50¢ stamp and a seal.

Entered in the annotation letter A of property number 48, page 4 turned, of volume 2° of Loiza.

San Juan, Porto Rico, April 9, 1906.

[SEAL.] (Signed) The Registrar, JOSE BENEDICTO.

10 In the District Court of the United States for Porto Rico
Sitting at San Juan.

(Filed June 14, 1912.)

JOSEFA RUIZ DE NOBLE et al., Plaintiffs,
vs.
ELISA GALLARDO SEARY et al., Defendants.

Demurrer and Plea to the Bill of Complaint.

The Demurrer and plea of Elisa Gallardo y Seary, Estefani Veronne, Celestina Gallardo y Veronne and Eva Gallardo y Veronne, Defendants, to the bill of complaint of Josefa Ruiz de Noble et al., the Above-mentioned Plaintiffs.

First. These defendants respectively, jointly and severally, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged demur to the whole of said bill.

And for cause of demurrer show:

1°. That it appears by the plaintiffs' own showing by the said bill that he is not entitled to the relief prayed by said bill against these defendants.

2°. That it appears from said bill of complaint of plaintiffs that this Court has no jurisdiction to hear and determine this action.

11 3°. That said bill of complaint of plaintiffs is wholly without equity.

Second. And the said defendants not waiving their said several demurrers, but wholly relying thereon as to the whole of the said bill, do plead thereto and for plea, to the whole of said bill, say:

That the cause of action herein, if any ever existed, which defendants deny, accrued in the year 1865; that said cause of action, if any ever existed, which defendants deny, is a demand that has long time since been and is now barred and is extinct by law and specially by Art. — of the Mortgage Law of May, 1880; Article 134 of the Mortgage Law of May 26th, 1893, and Articles 1864, 1865, clause 3 of Art. 1867, and 1840 of the Civil Code now in force in Porto Rico, and by Articles 1963, 1964, clause 3 of 1966 and 1939 of the Civil Code of Porto Rico of 1889.

That the plaintiffs ought not to have or maintain their suit herein for that if any cause of action ever existed against these defendants, or any of them, the same accrued *mora* than thirty, twenty, fifteen and five years respectively prior to the time of the bringing of this suit, and this the defendants are ready to verify.

All of which matters and things these defendants do aver to be true, and they pray the judgment of this Hon. Court whether they

shall be compelled to make any further answer to the said Bill and pray to be hence dismissed with their reasonable costs and
12 charges in this behalf most wrongfully sustained.

San Juan, P. R., June 13, 1912.

(Signed) MIGUEL GUERRA,
Attorney for Defendants.

I, Estefania Veronne, being duly sworn, on my oath depose and say that I am one of the defendants in the above entitled case; that the foregoing demurrer is not interposed for delay and that the same is true in point of fact, and that the allegations in the foregoing plea are true.

(Signed) ESTEFANIA V. DE GALLARDO.

Subscribed and sworn to before me this the 14th day of June, 1912.

(Signed) GABRIEL GUERRA,
[NOTARY'S SEAL.] *Notary Public.*

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

(Signed) MIGUEL GUERRA.
[NOTARY'S SEAL.] *Attorney for Defendants.*

13 *Order Overruling Demurrer & Plea and Granting Leave to Plead.*

In the District Court of the United States for Porto Rico.

(Journal Entry, June 20, 1912.)

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

The demurrer and the plea filed by the defendants in the above entitled cause, are heard by the Court and after being duly considered, same are overruled, and said defendants have leave to renew same or to answer until Wednesday, July 10th, 1912, to which action of the Court, defendants duly object and except.

14 In the District Court of the United States for Porto Rico.

Filed July 11, 1912.

No. 524, San Juan.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELISA GALLARDO et al.

Order pro Confesso.

It appearing that all the defendants in this cause have heretofore, after other pleadings herein, filed their demurrer and plea to the bill of complaint of the complainants; that said demurrer and plea came on to be heard as to their sufficiency and were heard before this Court on the — day of June last; and that upon such hearing the same were overruled and said defendants given until the 10th day of July, 1912, to file further pleading or defence in said cause;

And it further appearing that said 10th day of July, 1912, is now passed and said defendants herein, and each of them, have not further pleaded in compliance with said order of the court, and have wholly failed to make any further defence to the complainants' said bill of complaint within the time limited by said order;

Now, therefore, on motion of N. B. K. Pettingill, Esq., solicitor for complainants, it is ordered that the bill of complaint in said cause be taken pro confesso as to all the defendants therein, in accordance with the Rules of Equity in such cases made and provided, and that said complainants have leave to proceed herein ex parte.

San Juan, Porto Rico, July 11, 1912.

(Signed) N. B. K. PETTINGILL,
Solicitor for Complainants.

15 In the District Court of the United States for the District of Porto Rico.

(Filed Nov. 8th, 1912.)

JOSEFA RUIZ DE NOBLE et al., Plaintiffs,
vs.
ELISA GALLARDO Y SEARY et al., Defendants.

Application of Defendants to Set Aside Order pro Confesso Entered Herein.

To the Hon. Paul Charlton, Judge of said Court:

Now come respondents herein by their attorney Miguel Guerra, and respectfully represents:

That said respondents interposed and filed their plea and demurrer to the complainants' bill on the 14th day of June, 1912; that the hearing on said plea and demurrer was held before Your Honor at Chambers, on the 20th day of June, 1912, and that on this last mentioned day the following order was given by Your Honor:

"The demurrer and the plea filed by the defendants in the above entitled cause, are heard by the Court, and, after being duly considered, same are overruled, and said defendants have leave to renew same or to answer, until Wednesday, July 10, 1912."

That said respondents have not filed their answer for the reasons more fully specified in the affidavit of merits attached hereto; that complainants herein entered a pro confesso order on the 11th
16 day of July, 1912; that respondents herein now do tender their answer, and beg to renew their plea and demurrer filed as aforesaid; that the said respondents do hereby offer to pay plaintiffs herein whatever costs and expenses said plaintiffs may have incurred since the filing by said respondents of their demurrer and plea, and to restore to plaintiffs any substantial benefit accruing under the said order pro confesso.

That respondents have a meritorious and just defense, and that it would further the ends of justice that they, the said respondents, may be allowed to file their answer and to renew their said demurrer and plea.

That this is a very important case, involving a large amount of property, and that it would be equitable to allow respondents to plea-.

That the Court, prior to the departure of the judge thereof to the United States, was busily engaged in various important matters concerning the different corporations which at the time were put in the hands of receivers, and the undersigned being engaged also in the Solá é Hijo bankruptcy proceedings, could not bring this matter to the attention of the Court.

Wherefore, respondents pray that Your Honor set aside the said Order pro confesso and grant them leave to file their answer and to renew their demurrer and plea.

(Signed) MIGUEL GUERRA,
Attorney for Respondents.

17 In the District Court of the United States for the District of Porto Rico.

(Filed Nov. 8, 1912.)

JOSEFA RUIZ DE NOBLE et al., Complainants,
vs.
ELISA GALLARDO Y SEARY et al., Respondents.

Affidavit of Merits.

Before me appears Miguel Guerra, who, being first duly sworn, deposes and says:

That he is the attorney for respondents herein.

That ever since the date this Hon. Court overruled said respond-

ents' demurrer and plea, to wit, on the 20th day of June, 1912, deponent has persistently searched in the files of the Insular Court of San Juan for the records pertaining to the bankruptcy proceedings instituted against one Ramon Ruiz Gandia, from the years 1866 to 1883, both inclusive, to obtain data sufficient to enable himself to answer paragraph 5 of complainants' bill of complaint, and to conscientiously meet each and all of complainants' allegations as to facts arising out of said bankruptcy proceedings. Deponent says that in spite of all his diligence and of the labor and time he spent personally searching and looking through a voluminous number of old "expedientes," he, deponent, was unable to find any records throwing any light upon the said bankruptcy proceeding alluded to in said complainants' bill. Deponent says that said proceed-
18 ings were actually instituted in some court in this Island of Porto Rico, some time between the years 1866 and 1883; that deponent, although having in his possession evidences of some of said proceedings, was utterly devoid of all the necessary data to properly draw an answer that would meet each and every allegation of complainants' bill of complaint; that deponent has used all reasonable diligence in procuring the said records; that the demand which is the subject matter of this suit and the cause of action therein stated, accrued as far back as 1863, over forty-nine years ago; that none of the respondents herein have ever intervened or taken any part in any of the transactions alleged in complainants' bill; that defendants herein were scarcely in possession of any data throwing any light on this suit, as to their defense; that deponent has had to personally go through the old archives of San Juan searching for all records bearing any light and weight upon the allegations of complainants' bill; that deponent has even searched, personally, the archives and files of the Insular Court of Humacao, without avail; that deponent has spent much time inspecting old records, deeds and entries in the Registry of Property of San Juan, all but to obtain a slight part of the data that must exist somewhere in some old registry or archive.

That by virtue of the said order of this Court, overruling the said demurrer and plea of said respondents, the same were given leave to file their answer or renew their said plea and demurrer up to the 10th day of July, 1912; that on or about the 8th day of July, 1912, deponent personally and verbally asked the Hon. Paul Charlton, Judge of this Court, for an extension of time to file the answer in the above entitled suit, for the reason, as aforesaid, that he, de-
19 ponent, had not been able, up to that time, to obtain data sufficient to draw an answer that would meet the allegations of complainants' bill; that thereupon, the said, the Hon. Paul Charlton, told deponent that he would speak to Mr. N. B. K. Pettingill about the said extension of time. That deponent, having brought to the attention of the Court that fact that he desired an extension of said time to answer, felt as if no formal petition was necessary to attain the said end; that from the said day, to wit, on or about July 8, 1912, up to the return of the said Hon. Paul Charlton, deponent did not bring up the said question about extending the time to

answer, because the Court was busily engaged in the case of Solá é Hijo, S. en C., and the Borinquen Sugar Company, pending before this Court, and because of the reason that the Court was in recess during the absence of the Judge thereof. That after the return of the Honorable Judge of this Court from the United States, deponent spoke to him in regard to the order pro confesso entered herein, and deponent was unable to bring up the question before the Court on account of the same being engaged in various other important matters.

Deponent states that the so-called mortgage which complainants herein are endeavoring to collect and foreclose as against these respondents, is not a mortgage, and was never a mortgage in accordance with the laws of Porto Rico now in force or those in force at the time the said alleged lien was created; that the said lien was only one upon the products of the lands in question, and not upon the realty itself; that the said lien was never recorded as weighing upon the lands of the "San Jose del Cacique" estate; that complainants herein presented in the Registry of Property of San Juan the deed, "Exhibit A" for the complainants, wherein and whereby the said alleged mortgage was created, for the proper registration
20 thereof, on the 9th day of April, 1906, that said pretended mortgage might have legal force and effect; and deponent says that on the said date, to wit, the 9th of April, 1906, the Registrar of Property of San Juan refused and denied to complainants herein the registration and inscription of the said deed,—Exhibit A for the complainants filed herein,—for the reasons which, literally copied, read as follows:

"Taking into consideration that the existing inscription in the old registry, the transfer of which is asked for, only affects the products which are manufactured at the San Jose del Cacique hacienda, the same not constituting a lien upon the realty, and although said lien is mentioned as a mortgage, among the other encumbrances upon the estate, said mention cannot be given any other — greater force or effect than that which the old inscription gives it; taking into consideration the fact that the said property, inscribed in favor of Don Ricardo Gallardo, is not mortgaged * * * I deny the transfer asked for. * * *"

That the above copied paragraphs relate to the mortgage alleged in complainants' bill and refer to the estate therein mentioned.

Deponent states that complainants herein have not availed themselves of the remedy the law grants them, of appealing to the Supreme Court of Porto Rico from the decision of the Registrar of Property of San Juan, partly above transcribed, and that the said decision of the said Registrar is final as to their pretended mortgage.

Deponent states that respondents' ancestor, the said Ricardo Gallardo, paid the amount the said Ruiz Gandia owed to com-
21 plainants' ancestor, to the trustees of the bankrupt estate of said Ruiz, by deed executed before the Notary Don Demetrio Gimenez y Moreno, on the 10th day of August, 1883.

Deponent states that his failure to renew the plea and the demurrer filed as aforesaid, is due to the fact that deponent assumed

that it was not necessary to refile the same in order to have the same brought up for final discussion and consideration.

(S'g'd) MIGUEL GUERRA.

Subscribed and sworn to before me this 8th day of November, 1912.

(S'g'd) RAFAEL GUILLERMETY,
[SEAL.] *Clerk U. S. District Court of Porto Rico.*

22 (Filed Nov. 30, 1912.)

The Registrar of Property of San Juan, Section 1.

Carlos Pesquera as verbal mandatory of Doña Estefania Veronne sets forth:

That my constituent would like to obtain a certificate in relation to the liens and incumbrances laid upon the property called San Jose del Cacique, inscribed in favor of Don Ricardo Gallardo at folio 2 of volume 2 of Loiza, property number 48 first inscription.

Likewise he requests that a literal certified copy be issued of the entry letter "A" which appears in the subsequent inscription for the same property and volume.

Porto Rico, November 20, 1912.

CARLOS PESQUERA.

23 Registry of Property, Section One, San Juan, P. R.

Jose S. Belaval, Registrar of Property of San Juan, Puerto Rico, Section One,

Certify, in compliance with the preceding request, that at folio 4, volume 2, of Loiza, property number 48, there appears an entry marked letter "A" which literally copied reads as follows:

"A" Rustic.—Sugar cane plantation, called "San Jose de Cacique" in the ward of the town of Loiza, whose description and liens appear from the preceding inscriptions. Mr. David Noble y Ruiz, as general attorney in fact for the succession of his father Don Guillermo Noble, in a petition hereinafter to be mentioned, has requested the transfer to this Modern Registry of Property of the entry made at folio 7, number 11, of Book 20 of the Old "Anotaduria" of Mortgages, wherein it appears that Don Ramon Ruiz, neighbor of Loiza, by deed executed in the town of Naguabo, on the 22nd of December 1865, before the Public Scrivener of that place Don Jose Celestino Schroder, constituted himself as debtor to Don Guillermo Noble, of that vicinity, in the sum of sixteen thousand one hundred and eighty-six "escudos" crowns, current money, which he bound himself to pay with the proceeds of the crops of the cane plantation called "San Jose de Cacique" situated in the municipality of Loiza, and as security thereof he especially encumbered the products manufactured in said mill, from January the 2nd, 1866 and thereafter, under the condition that the same could not be sold, encum-

bered nor mortgaged in favor of any other party, or else it should be held void; and in another petition dated March 29th last, Doña Josefa Ruiz y Gandia, widow of Don Guillermo Noble, of full age, of this vicinity, in her own right as such widow, and besides as heir of her son Don Carlos Manuel Noble y Ruiz; Don Arturo H. Noble y Ruiz, single, property owner, of legal age, and resi-
24 dent of this city, by himself and as attorney in fact for his sisters Doña Josefa Barbara, Doña Maria Teresa and Doña Sara Isabel Noble y Ruiz, and Don Guillermo Noble y Ruiz, single, and Don Jaime R. Noble y Ruiz, married, of full age and of this vicinity in their own right, and all of them as sole members of the succession of Don Guillermo Noble, approve and ratify the petition wherein said transfer is prayed for, and make a similar petition the same as though it had been subscribed by them, accompanying to said petition of ratification an affidavit signed before the Notary Don Julio Cesar Gonzalez, by Mr. A. H. Noble, on the 31st of the month of March aforesaid, affirming that he is the attorney in fact for said succession of Don Guillermo Noble, composed of his widow, Mrs. Josefa Ruiz Gandia, and her children Don Jaime R. Doña Sara Isabel, Doña Josefa Barbara, Doña Maria Teresa and Don Guillermo Noble y Ruiz, which petition of ratification is signed by Doña Josefa R. de Noble, Don A. H. Noble, and J. R. Noble. In virtue thereof, and observing that the entry existing at the old "Anotaduria" the transfer of which is sought for, only affects the products to be manufactured in the plantation "San Jose Cacique", not constituting a lien upon the property, and although it is mentioned as a mortgage in the section of encumbrances upon the property of this number it cannot be given to that reference a wider scope than that of the old entry; that in the first inscription in favor of Don Ricardo Gallardo, it does not appear that he had mortgaged said property, nor the portion which he purchased from the Trustees of the estate of the bankrupt Don Ramon Ruiz, to answer for the amount which the latter owed to Mr. Noble, which does not appear either from the documents which they have produced, so the transfer requested is denied, and I issue in lieu therof this cautionary notice, for the period of time provided by law, in favor of Don Guillermo Noble.

25 All of the above appears from the Registry and from the petition hereinbefore mentioned, signed on the 12th of January last, by Mr. David Noble y Ruiz, from a copy of a deed executed in the town of Naguabo on the 22nd of December 1865, before the scrivener Don Jose Celestino Schroeder, whereby it is constituted the obligation which caused the old entry aforesaid, the said copy having been issued by the Notary Recorder General of Protocols of the District of Humacao Don Antonio de Aldrey, on August 4th, of the last year; from a copy of the power of attorney granted by Doña Josefa Ruiz de Noble, Don Jaime, Doña Sara Isabel, Don Arturo H. Doña Josefa B. and Doña Maria T. Noble y Ruiz, in this city on the 10th of October ultimo, before the Notary Don Damian Monserrat, to Don Guillermo D. Noble y Ruiz; and from a copy issued by the Notary General Recorder of Protocols of

this District, Don Santiago R. Palmer, on the 17th of said month of October: from a deed number 266 dated August 10th, 1883, executed in this city before the Notary Don Demetrio Gimenez y Moreno, whereby Don Juan Emilio Turull y Amadeo, and Don Jose Pacreco, executed acquittance for the sum of sixteen thousand and eighty three crowns (escudos) eight hundred and eighty thousandths, being the amount of a mortgage credit which appears in said first inscription of this number in favor of the former, which was included among the claims against the bankrupt estate of Don Ramon Ruiz, of which Messrs. Turull and Pacheco were trustees, the said notice being in favor of Don Juan Emilio Turull and not of Don Juan Emilio Turull y Amadeo, as has been expressed, all of which documents have been produced at this Registry on the 24th of February of the present year, it also appearing from the deed of ratification and affidavits above mentioned, and from the copy of the deed of inventory and partition of the inheritance left by Don Guillermo Noble dated October 5th, 1886, executed in Humacao, before the Notary Don Marcelino Estebanez Manclares, which said copy was issued on the 22nd of the same month and year by
26 the subscribing notary inserting therein the testament and codicil of Mr. Noble dated respectively December the 7th, 1881 and December 15th, 1882, both executed in the ward of Daguao of Naguabo, before the Notary Don Eugenio de Torres y Ramos, which documents have been also produced at this office on the 2nd inst. And the above being in conformity with the Registry and documents referred to, I have hereunto set my hand in San Juan Bautista de Puerto Rico, on the 9th of April 1906—Jose Benedicto.

On the margin of annotation letter "A" inserted above, there appears the following note:

Cancelled entry letter "A" in front, the term for which it was issued having expired without having correct- the defects which caused it.—San Juan, P. R. November 27, 1912.—Belaval.

The entry and note copied are in conformity with their respective originals to which I refer.

That the description to which this property refer-ed is as follows:

Sugar cane plantation called San Jose de Cacique, in the ward of Pueblo in the municipality of Loiza, composed of eight hundred and thirty-eight cuerdas of first and third class land equivalent to 329 hectares, 37 areas, 75 centiares, containing besides two dwelling houses thereon, one of which has its first floor of masonry and the top floor of wood, zinc roofed, and the other a one story house of wood, with the same class of roof, sugar mill, and distillery, of masonry and wood, roofed with shingles and zinc. It is bounded on the North by the village of Las Cuevas, owned by Don Felipe Moreno, Patricio Davila, Jacinto Rivera and Fabian Fuentes, and the farms of the Medianias of Don Javier Zequiera, Doniel Zavallos, Petrona Ferrer, Jose Pizarro, Placido Ferrer Tomas Velasquez, Eugenio Andrade, Aniceto Pizarro, Pedro Pablo Ferrer, Tomas Ferrer, Pedro Boria, Celestino Mojica Felipe Ayende, Fabian Fuentes and Francisco Torres, on the South by other lands belonging to

Don Ricardo Gallardo, those of Don Pablo Ubarri, and those
27 Don Antonio Garcia Rebolledo, represented by Don Javier Zequeira, on the East by lands of Cecilio Lopez and those of Don Pablo Ubarri and on the West by the Rio Grande de Loiza, and others of the said Gallardo, said property having an easement constituted by the vicinal road of Canovanas which crosses it.

That the above described property, the possession of which is now inscribed in favor of Ricardo Gallardo y Rivera, at folio 2, of volume 2 of Loiza, property number 48—inscription first, is subject to the following incumbrances:

First. To the mention of the following incumbrances: One "censo" for six hundred and twenty five pesos at five per cent. per annum in favor of the Convent of the Carmelite nuns of this city, recognized in the title presented for the said first inscription inscribed at folio 119 over, number 447 book 3 of the Old Registry. "B" one" refaccion loan for agricultural purposes in favor of Don Jose Rufino Goenaga for six thousand sixty three pesos, 35 cents, inscribed at folio 66 over, number 118 of volume 19 of the old Registry. "C" A mortgage in favor of Don Guillermo Noble for sixteen thousand one hundred and eighty-six crowns (escudos) 26 hundredths, in favor of Don Pedro David, inscribed at folio 121, number 242 of the same book 20, and which according to a marginal note attached to the foregoing entry appears as cancelled, the same should be considered void, as it has not been shown that one Doña Juana Luisa Correa alleged to be the widow of Don Pedro David, had a right to cancel said obligation.

This mention of liens appears from the said first inscription of the property in question, and

Second. Notice of a complaint filed in the District Court of the United States for Porto Rico, by attorneys N. B. K. Pettingill and Robert H. Todd, in representation of the Succession of Don Guillermo Noble, composed of Josefa Ruiz de Noble, James R. Noble, William Sara Isabel Noble de McCormick, Arthur H. Noble,
28 Josefa B. Noble and Maria T. Noble, as plaintiffs against the succession of Don Ricardo Gallardo, composed of Elisa Gallardo Seary, Estefania Varroni, Celestina Gallardo Varroni and Eva Gallardo Varroni as defendants, there appearing as intervenors the Succession of Don Jose Rufino de Goenaga, composed of Francisco Goenaga Olsa, Ana Goenaga Olsa de Chabert, Francisco Goenaga Fuertes, Nicholas Garcia de Quevedo y Goenaga, Rufino Goenaga Fuertes, Felix Padial Goenaga, Maria Padial Goenaga de Solomon, Augusto Garcia de Quevedo Goenaga, Obdulia de Cottes Goenaga y Victoria Cottes y Goenaga de Ferrer, the said complaint being dated January 6th, 1808, in which suit the plaintiffs and the intervenors asked the Court to declare that there existed upon the said property a lien in favor of said plaintiffs and intervenors, for the sums of sixteen thousand one hundred and eighty six crowns and six thousand sixty three pesos 35 cents respectively, with interests, the first from December 22nd 1865, and the second from the 1st of December 1864; that in case the said credits with their interests should not be paid within a given term, the said property or

so much thereof as may be necessary, be sold in order to make said payments: that the defendants inherited said property subject to said lien, and that in case that said sale should be effected, all the rights, titles and interests of the said defendants shall stand excluded and cancelled, and that the title be transferred to the purchasers in said sale and that plaintiffs and the intervenors be granted all other equitable relief as may be proper; the said suit being pending on appeal before the Supreme Court of the United States, which notice of complaint appears at the margin of inscription first of the said property, number 48, folio 2, volume 2 of Loiza, there appearing no other lien inscribed in the Registry.

It so appears from the books of the Registry to which I refer.

In testimony whereof, I issue the present in San Juan Porto
29 Rico, on the 29th of November, 1912.

JOSE S. BELAVAL.

The above is a correct translation.

(Signed) F. FANO,

Interpreter & Translator U. S. Court.

30 In the District Court of the United States for Porto Rico.

Filed November 30, 1912.

Mr. Registrar of Property, Section 2:

Carlos Pesquera as verbal mandatary of Doña Estefania Veronne sets forth:

That my constituent desires to obtain a literal certified copy of entry number 11, at folio 7 of book 20 of the old "Anotaduria" of Mortgages.

Porto Rico, November 20, 1912.

CARLOS PESQUERA.

Presented together with two stamps of one dollar each.

San Juan Porto Rico November 21, 1912.

JOSE BENEDICTO.

C. PESQUERA.

31 Jose Benedicto y Geigel, Registrar of Property of San Juan, Porto Rico, Section 2.

I certify, in view of the foregoing petition:

That at Folio 7 of Book 20 of the old "Anotaduria" of mortgages, there appears an entry marked under number 11, which literally copied reads as follows:

Don Ramon Ruiz, resident of Loiza, by deed executed in the town of Naguabo, on the 22nd of December last past, before the public scrivener thereof Don Jose Celestino Schroder, acknowledged himself as debtor to Don Guillermo Noble of that neighborhood in the sum of sixteen thousand one hundred and eighty six crowns current money which he bound himself to pay with the

proceeds of the crops of the sugar plantation called "San Jose Cacique" situated in the district of Loiza, and as security therefor he pledged especially the products to be manufactured in said sugar mill from the present month and thereafter upon condition that he shall not sell, encumber or mortgage the same in favor of any other, otherwise the same shall be held void.

Porto Rico January 22nd, 1866.

(Signed) PEDRO R. ESCALONA.

The foregoing entry is a true copy of the original of its contents to which I refer; not including in this certificate other particulars because the property does not correspond to this section.

In testimony whereof, I issue the present which I sign and seal in San Juan, Porto Rico, at two o'clock of this afternoon on this 22nd day of November 1912.

JOSE BENEDICTO.

The above is a correct translation.
(Signed) F. FANO,
Interpreter & Translator U. S. Court.

32 (Verified Copy.)

Acquittance.

Number Two Hundred and Sixty Six.

In the city of San Juan de Puerto Rico, on the 10th of August 1883, before me, Don Demetrio Jimenez y Moreno, resident thereof, Notary Public of its District and Territorial College of this Island and before the witnesses hereinafter to be named, appear

Of one part: Don Juan Emilio Turull y Amadeo, and Don Jose Pacheco, married, over 40 years of age, property owners of this vicinity, as per personal certificates (cedulas) of the 6th class issued by the Local Authority under numbers 2109 and — respectively which they exhibit and I return to them.

And of the other: Don Ricardo Gallardo y Rivera, married, 47 years of age, sugar planter, neighbor of the town of Loiza, temporarily residing in this city, who also exhibits his personal certificate.

And they assuring me that they are in the full enjoyment of their civil rights, and with legal capacity, in my judgment, to execute the present deed of acquittance and cancellation of mortgage, of all of which, as well as to my knowledge of the parties, and other circumstances, I certify, they set forth:

First. That Mr. Gallardo is the owner in full dominion of the following property:

A Sugar Cane Plantation, called "San Jose de Cacique" situated in the ward of the town of Loiza, composed of eight hundred and thirty eight cuerdas, equivalent to three hundred and twenty nine hectares, thirty six ares, seventy five centiares, with two dwelling houses, one of first and second floor, built of masonry and wood,

zinc roofed, and another one of one story, of wood; plant
33 for the manufacture of sugar and rum, of masonry and wood, roofed with shingles and zinc; bounded all along its northern boundary by the hamlet of Las Cuevas and the Mediania farms belonging to several owners; on the South by lands of the said Mr. Gallardo, and those of Don Pablo Ubarri and Don Antonio Garcia Revolledo; on the East by lands of Cecilio Lopez and Don Pablo Ubarri, and on the West by the River Grande of Loiza and other lands of Mr. Gallardo.

Which property he has inscribed by virtue of a supplementary title in the Registry of Property, volume 44 of the Archive, second of Loiza, folio 2, property number 48, inscription first.

Second. That at the time of entering said inscription of possession, there were charged to the above described property several liens to which the same was subject, according to the books of the old "Anotaduria" of Mortgages, amongst which there is one for five thousand nine hundred and fifty nine pesos in favor of Don Juan Emilio Turull, inscribed at folio 82, book 18 which was increased up to sixteen thousand and eighty three crowns eight hundred and eighty thousandths, by entry number twenty two at folio 13 of book 20.

Third. That both credits were included in the claims of creditors against Don Ramon Ruiz Gandia, bankrupt, represented by his trustees, the parties hereto, Messrs. Pacheco and Turull; but Mr. Gallardo being the owner of the property subject to the liens thereon, he has been paying the same on different installments fixed by mutual agreement with the creditors, up to this day when he has paid up in full those recited in the preceding chapter.

Consequently, and in order that the entries aforementioned may be totally cancelled in the Registry of Property, and the said sugar plantation may remain free from those incumbrances, by these presents, they

Issue in favor of Don Ricardo Gallardo y Rivera, and of
34 those who may have a better right thereto, the most solemn acquittance for their best safeguard, for the total sum which said credit involves, thus declaring free from all liability the described property and wishing and yielding to the total cancellation of the entries made at folios 82 of book 18 and 13 number 22 of book 20, and at the same time binding themselves not to make any claim against Mr. Gallardo in the future, of any kind or character, for such concept.

Fourth. The parties hereto being aware of the contents of this deed solemnly accepted it.

And I the Notary advised the parties that a first copy of this deed must be presented for registration at the Registry of Property of this capital, without which requisite it shall not prejudice a third party neither shall it be admitted in evidence in any tribunal, Council or office.

They so stated, executed and signed before the witnesses Don Jose F. Adsuar, and Don Jaime de Goicoechea y Elfao, of this vic-nity, without legal disqualification to act as such; and having

read to them this deed, they having waived their right to do it themselves, the same is approved and ratified of which I give faith. Signed: Jose Pacheco.—J. Emilio Turull.—Jose F. Adsuar.—As witness at the request of Don R. Gallardo Jesus de Goicoechea.—Marked and signed: Demetrio Gimenez y Moreno.

It is a true and correct copy of its original filed in the protocol of the late notary of this capital Don Demetrio Jimenez y Moreno in the year 1883, now in my charge as general recorder of notarial protocols of this district. In testimony whereof and at the request of an interested party I issue the present on one sheet of paper of my use, affixing to it an internal revenue stamp of fifty cents, having taken note of this copy and marking and signing the same in San Juan, Porto Rico November 8th, 1912.

(Signed) HERMO. DIAZ,
Lawyer-Notary.

The above is a correct translation.
(S'g'd) F. FANO,
Interpreter & Translator, U. S. Court.

35 In the District Court of the United States for the District of Porto Rico.

(Filed Nov. 30, 1912.)

Equity. No. 524.

JOSEFA RUIZ DE NOBLE et al., Complainants,
vs.
ELISA GALLARDO Y SEARY et al., Respondents.

Answer.

Now come the respondents herein, by their attorney Miguel Guerra, and in answer to the complainants' bill of complaint, answer and allege:

I.

Respondents admit that during and prior to the year of our Lord 1865, one Ramon Ruiz Gandia, since deceased, was the owner of an undivided interest in the estate called "San José Cacique," and that the said Ruiz Gandia was at the same time in possession and control of the whole of said plantation or estate by virtue of a lease of the remaining interest therein from his co-owners, Doña Amalia Seary, Don Ricardo Gallardo and Don Jorge Seary; but respondents deny that the contract referred to in complainants' said bill of complaint, ever was and is a contract of refaccion, and they aver the fact to be that said contract was merely an acknowledgment of a liquidated indebtedness which said Ruiz Gandia owed then and there to complainants' ancestor, the said William Noble, whereby the said Gandia obligated to pay Noble the said indebted-

ness with the crops which might be ground at the said estate
36 from the year 1866 until the full payment of the indebtedness thereby acknowledged. Respondents further allege, in answer to the first paragraph of said bill of complaint, that the said Ruiz Gandia remained in possession, as aforesaid, of the said estate until he was adjudged to be in bankruptcy, by some court of competent jurisdiction of this Island, some time between the years 1866 and 1870.

II.

In answer to the second paragraph of said bill, respondents admit that on the 22nd day of December, 1865, the said Ramon Ruiz Gandia executed in favor of complainants' ancestor, William Noble, the deed which, marked "Exhibit A," is filed and attached as a part of said bill of complaint; but respondents deny that said deed and instrument, executed as aforesaid, was an acknowledgment of a mortgage lien upon the lands in question, but merely the recognition of a personal indebtedness which the said Ruiz Gandia thereby obligated to pay from the proceeds of the crop of 1866 and the following years until the complete and full payment thereof.

Respondents aver that the sum of $8,093.00 alluded to in said deed, was given to the said Ruiz Gandia by complainants' ancestor, not for the support and refaccion of said estate, but only for the payment of the lease of the same to the other co-owners.

Respondents further aver that the said Ruiz Gandia did not thereby create a lien upon his share or interest in the said estate, nor upon all of his property generally, for the contract aforesaid had no such effect, and because the law in force in Porto Rico at the time the said deed was executed expressly prohibited the execution or creation of general mortgages or liens. Said law was
37 Law 3rd, title 16, book 10 of the Novisima Recompilacion.

Respondents further aver that the said instrument, executed as aforesaid, did not create a mortgage upon the products of said estate; and allege the fact to be that under no law in existence in Porto Rico at the time of the execution of said deed, or ever since, can a mortgage be created upon personal property, for mortgages were and are only created upon real property or immovables.

III.

Respondents deny that, in accordance with the laws then and now in force in Porto Rico, the said indebtedness could ever be recorded as a lien upon the said estate "San José Cacique" in the then existing book of mortgages; they further deny that said indebtedness was ever recorded as a lien upon and against the land in question in the said book of mortgages, or in any other Registry; and respondents aver the fact to be that said indebtedness, and the deed whereby it was acknowledged, were recorded in the old "anotaduria" in book 20, folio 7, No. 11, literally as follows, to wit:

"Don Ramon Ruiz, a resident of Loiza, by deed executed in the town of Naguabo on the 22nd day of December last, before the public scribner of said town, Don José Celestino Schroder, constituted

himself a debtor of Don Guillermo Noble, of said town, in the sum of 16,196 escudos, current money, which sum he obligates himself to satisfy with the proceeds of the fruits of the sugar estate called "San José Cacique" situated in the municipality of Loiza, for the security of which he expressly affects the products which may be manufactured at said sugar estate from the current month
38 on, with the condition that the same may not be sold, encumbered or mortgaged, in favor of any other person, and, if so, the same to be null.

Puerto Rico, January 22nd, 1866. Signed—Pedro Rf. Escalona."

IV.

Respondents admit that said estate was a sugar factory, and bounded by and composed of the lands and houses alluded to and described in paragraph fourth of complainants' bill of complaint.

V.

Respondents admit that about the year 186- the said Ramon Ruiz Gandia was declared a bankrupt. But respondents deny that the above mentioned Ricardo Gallardo acquired title to the whole of said estate, subject to the lien of said William Noble; respondents further deny that the said Ricardo Gallardo was required, upon applying for the registry of his possessory title in the year 1882, or in any other year, or at all, to recognize the lien of said William Noble; and respondents further deny that the said Ricardo Gallardo ever recognized the validity and existence of said indebtedness, nor its lien upon said plantation, in the Registry of Property, Book 2 of Loiza, folio 2, estate No. 48, first inscription, nor in any other book of the said Registry.

Respondents further allege and aver the fact to be that the said indebtedness is mentioned in the list of liens upon the said property in the books of the modern registry; but that the said mention has, as will be hereinafter alleged, no other or further effect than
39 that which the old inscription in the "anotaduria" had.

VI.

Respondents aver, in answer to paragraph 6th of complainants' bill of complaint, that they have no information whatever as to whether or not the said Ruiz Gandia ever paid the said Noble the said sum, or any part thereof, or any interest thereon; respondents aver that although a diligent search has been made for the bankruptcy proceedings instituted against the said Ruiz Gandia, in the archives of the District Courts of San Juan and Humacao, the same have not been found, and therefore said respondents are not in a position to answer and allege whether Noble's indebtedness and claim against Ruiz Gandia was ever proved, allowed and paid by the trustees of the latter's estate.

Respondents deny that the said sum of money with its interest constitutes a mortgage lien upon the said estate.

Respondents admit that the said deed filed herein, marked "Exhibit A", was presented in the present Registry on the 9th day of April, A. D. 1906; but aver the fact to be that the Registrar of Property on said date denied the registration thereof as a mortgage upon the said estate, for the following reasons, which, literally copied, read:

"Taking into consideration that the existing inscription in the old registry, the transfer of which is asked for, only affects the products which are manufactured at the San José del Cacique hacienda, the same not constituting a lien upon the realty, and although said lien is mentioned as a mortgage, among the
40 other encumbrances upon the estate, said mencion cannot be given any greater force or effect than that which the old inscription gives it; taking into consideration the fact that the said property, inscribed in favor of Don Ricardo Gallardo, is not mortgaged * * *

I deny the transfer asked for * * *."

Respondents further allege that complainants herein have not availed themselves of the remedy the law gives them, of appealing to the Supreme Court of Porto Rico from the decision of the Registrar of Property of San Juan, partly above transcribed, and that the said decision of the said Registrar is final as to their pretended mortgage.

VII.

Respondents further deny that the said Ricardo Gallardo, in the year 1883, or at any other time, or at all, ever recognized the validity and existence of the said indebtedness as a lien upon the said estate, by virtue of any notarial deed, or at all.

Wherefore, respondents pray that they be hence dismissed with costs to complainants herein.

(Signed) MIGUEL GUERRA,
Attorney for Respondents.

41 In the District Court of the United States for Porto Rico.

(Journal Entry, Nov. 30, 1912.)

Order Denying Motion to Set Aside Order pro Confesso.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

The motion to reopen the above entitled cause is heard by the Court, and after being duly considered, same is denied according to law, and it is ordered that the decree pro confesso given herein, stand as entered in the records of this Court, to which action of the Court the defendants herein duly object and except.

42 In the District Court of the United States for Porto Rico.

(Filed Dec. 10, 1912.)

JAMES R. NOBLE et al.
vs.
ELISA GALLARDO et al.

To the Hon. Paul Charlton, Judge of the said Court:

Come now respondents herein by their attorney Miguel Guerra and states:

That by order of this Hon. Court entered herein on the 30th day of November, 1912, Francisco Goenaga and others were allowed to file as intervenors their petition, in the above entitled suit, affecting the same tract or real estate known by the name of San José de Cacique.

That, as petition states, the claim of said intervenors against said real estate is a lien of the same nature as that claimed by the complainants Noble in the above entitled suit.

That defendants herein were given twenty days from the date of the said order of the Court, to answer to the said petition of Francisco Goenaga and others.

That counsel for said complainants, James R. Noble, et al., has filed herein a draft of a final decree to be submitted to the consideration and signature of your Honor, as to the Noble lien, wherein stipulation is made that if defendants within the three months following the date of said decree should fail to pay the said Nobles the amount of the lien aforesaid, then the estate in question is to be sold at public auction in satisfaction of said indebtedness.

43 That said defendants will soon prepare their answer to the petition of said intervenors and join issue with them as to their pretended lien on said estate and that it would be more conducive to justice and equity that the drawing and approval of said final decree be left over until this Hon. Court passes upon the merits of said intervenors' claim, thus giving a final decree covering both of the Nobles' and the Goenagas' claims, and thus avoiding to said defendants the necessity of filing two different appeals from said different decrees.

For the reasons aforesaid, these defendants pray unto your Honor that the signing of the said decree be left in abeyance until the Goenaga claim is finally passed upon and decided by this Court.

(Signed) MIGUEL GUERRA,
Counsel for Defendants.

Notice, with copy, of the preceding motion is hereby acknowledged.

San Juan, P. R., Dec. 9, 1912.

(Signed) N. B. K. PETTINGILL,
Counsel for Complainants and Intervenors.

December 10, 1912.

After hearing the motion is denied.
(Signed) PAUL CHARLTON.

44 In the District Court of the United States for Porto Rico.

(Filed Dec. 10, 1912.)

No. 524, San Juan.

JAMES R. NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

Final Decree.

This cause coming on this day for final hearing upon the application of counsel for the complainants for a decree herein according to the prayer of their bill of complaint, a decree pro confesso having been duly entered on the 11th day of July, 1912, for want of further pleading by defendants within the time limited therefor by the Court, and counsel for defendants having been given further opportunity notwithstanding said decree pro confesso to be heard as to the form of this decree and the Court being fully advised in the premises;

It is thereupon ordered, adjudged and decreed that the equity of this cause is with the complainants; that on the 22nd day of December, A. D. 1865, one Ramon Ruiz Gandia was indebted to William Noble, ancestor of complainants, in the sum of eight thousand and ninety-three dollars gold ($8,093) for which he gave said Noble a mortgage lien, in addition to the tacit mortgage fixed by the law then in force, upon a certain plantation called "San Jose Cacique", situated within this district and hereinafter more fully described, which he agreed to pay during the following year; that thereafter and before paying any portion of said indebtedness the said Ramon Ruiz Gandia became bankrupt; that thereafter one Ricardo Gallardo, the ancestor of the defendants herein, acquired said property from said bankrupt estate subject to various
45 liens and among them the above lien in favor of said William Noble; and that, upon applying for and obtaining the recording of his title to said property in the books of the New Registry of Property in the year 1882, said Gallardo recognized as valid and agreed to pay certain liens on said property and among them said mortgage lien of said William Noble.

It is further hereby ordered, adjudged and decreed that the complainants James R. Noble, William D. Noble, Sara Isabel Noble, Arthur H. Noble, Josefa B. Noble and Maria T. Noble are found to be the children and only heirs at law of said William Noble and the owners by inheritance from him of the said indebtedness and mortgage lien; and the defendants Eliza Gallardo y Seary, Estefania Varonni, Celestina Gallardo y Varonni and Eva Gallardo y Varonni are found to be the heirs of said Ricardo Gallardo, deceased.

and the owners of said described real property by descent from him; and that, by the recognition of the continued existence and validity of said mortgage indebtedness by said Ricardo Gallardo in the year 1882 as aforesaid and subsequently by notarial instrument in the year 1883, the running of the statute of limitations against said indebtedness was interrupted and, thirty years not having elapsed from the time of such recognition to the date of the beginning of this suit, the right of complainants to demand the foreclosure of their said lien upon said real estate is a valid and subsisting right; and that the amount due thereon is the said principal sum of eight thousand and ninety-three dollars with interest thereon at the legal rate of six per centum per annum from the first day of January, 1883, the date of acknowledgment by Gallardo, amounting to the sum of fourteen thousand five hundred and forty dollars ($14,540),
46 making a total of twenty-two thousand six hundred and thirty-three dollars ($22,633).

It is therefore hereby further ordered, adjudged and decreed that, unless the said defendants pay or cause to be paid to the complainants within three months from this date the said sum of thirty thousand three hundred and forty-eight dollars, so found to be due as aforesaid, and in default thereof, the said mortgaged premises, described as follows, to wit: the plantation called "San Jose Cacique" consisting of eight hundred and thirty-eight cuerdas of land, lying within the barrio of the town of Loiza, having thereon two dwelling houses and various buildings composing a sugar factory, at that time bounded as follows: on the north, by the settlement called Las Cuevas and the farms of the Mediania belonging to various owners; on the south, by lands of Ricardo Gallardo, of Pablo Ubarri and of Antonio Garcia Revolledo; on the east, by lands of Cecilo Lopez and of said Pablo Ubarri; and on the west by the Rio Grande de Loiza and other lands of the same Gallardo; or so much thereof as may be necessary and sufficient to realize the amount due complainants as aforesaid for principal and interest, be sold at public auction by the Special Master in Chancery of this Court to the highest and best bidder for cash to satisfy the amount decreed to be a lien thereon as aforesaid.

It is hereby further ordered, adjudged and decreed that John L. Haas be, and he is hereby, appointed Special Master in Chancery of this Court to execute this decree by making said sale; that he give public notice of the time and place of such sale by previously publishing the same once each week for four consecutive weeks in a newspaper regularly published and having a general circulation in this District; that said sale be made at the door of the Court House of this Court in the city of San Juan aforesaid; and that said Special Master do make a report to this Court of his doings in the premises with all convenient speed, in case said indebtedness is not sooner satisfied and such sale rendered unnecessary.

It is hereby further ordered, adjudged and decreed that
47 the parties to this cause, or any of them, may become purchasers at said sale; and that, upon said sale being made and confirmed, the said defendants Eliza Gallardo y Seary, Estefania

Varonni, Celestina Gallardo y Varonni and Eva Gallardo y Varonni and all persons claiming by, through or under them, or either of them, since the commencement of this suit be forever barred and foreclosed of all right and equity of redemption in or to said mortgaged premises, or any part thereof; and that, in case the proceeds arising from said sale shall be insufficient to pay the amount so due the complainants as aforesaid, after deducting the costs of making said sale, which are to be first paid, the said Special Master shall in his report specify the amount of such deficiency; and, upon the confirmation of such sale, the complainants may upon application have such further decree in the premises as may be equitable.

And all other matters pending in this cause are hereby reserved until further order herein.

Done and ordered in open Court at San Juan, this 10th day of December, A. D. 1912.

(S'g'd) PAUL CHARLTON, *Judge.*

48 In the District Court of the United States for Porto Rico.

(Filed December 11, 1912.)

No. 524. Equity.

JAMES R. NOBLE et al.
vs.
ELISA GALLARDO Y SEARY et al.

Petition of Appeal.

The defendants Elisa Gallardo y Seary, Estefania Varonne, Celestina Gallardo y Varonne and Eva Gallardo y Varonne conceiving themselves aggrieved by the order of this Court made and entered in this cause on the 20th day of June, 1912, whereby the demurrer and the plea entered by said defendants in opposition to complainant's bill, were overruled; conceiving themselves also aggrieved by the order of this Court made and entered in this cause on the 30th day of November, 1912, whereby the application of said defendants to set aside the order pro confesso entered herein, was denied; and conceiving themselves aggrieved by the final decree heretofore made and entered by this Court in this cause, on the 10th day of December, 1912, whereby it was ordered, adjudged and decreed that the equity of said cause was and is with the complainants and against the defendants; and whereby it was further ordered, adjudged and decreed that on the 22nd day of December, A. D. 1865, one Ramon Ruiz Gandia was indebted to William Noble, ancestor of complainants, in the sum of $8,093 gold, for which he gave said Noble a mortgage lien, in addition to the tacit mortgage fixed by the law then in force, upon the plantation which is fully described in complainants' said bill of complaint, which said Ruiz Gandia
49 agreed to pay during the following year; that thereafter and before paying any portion of said indebtedness the said

Ramon Ruiz Gandia became bankrupt; that thereafter one Ricardo Gallardo, ancestor of said defendants, acquired said property from said bankrupt estate subject to the said lien of said William Noble and that, upon applying for and obtaining the recording of his title to said property in the books of the New Registry of Property in the year 1882, said Gallardo recognized as valid the said mortgage lien of said William Noble; and whereby it was further ordered, adjudged and decreed that by the recognition of the continued existence and validity of said indebtedness by said Ricardo Gallardo in the year 1882 and subsequently by Notarial instrument in the year 1883, the running of the statute of limitations against said indebtedness was interrupted and, thirty years not having elapsed from the time of such recognitions to the date of the beginning of this suit, the right of complainants to demand the foreclosure of their said lien upon said real estate is a valid and subsisting right; and that the amount due thereon is the said principal sum of $8,093 dollars with interest thereon at the legal rate of six per cent per annum from the first day of January, 1883, the date of acknowledgment by Gallardo, amounting to the sum of $14,540 making a total of twenty-two thousand six hundred and thirty three ($22,633) dollars; and whereby it was further ordered, adjudged and decreed that said real estate be sold at public auction by the special Master of this Court to the highest and best bidder to satisfy the amount decreed to be a lien thereon as aforesaid; and whereby it was further ordered, adjudged and decreed that said defendants, upon said sale being made and confirmed, be forever barred and foreclosed of all right and equity of redemption in or to said
50 mortgaged premises, or any part thereof; and, finally, said defendants, conceiving themselves also aggrieved by the order of this Court made and entered in this cause on the 10th day of December, 1912, whereby the motion of said defendants petitioning that the signing of said final Decree be left over and postponed until the Court could pass upon the petition in intervention of Francisco Goenaga et al. now pending in this cause, so that a sole and only decree may be given, covering each and all of the matters and issues involved in this cause, thus avoiding a multiplicity of appeals; do hereby appeal from said orders and final decree to the Supreme Court of the United States for the reasons specified in the assignment of errors to be filed herein, and they pray that this their petition of appeal may be allowed and may operate as a supersedeas upon the giving of a bond in the sum to be fixed by the Court, and that a transcript of the record, proceedings and papers upon which said orders and decree were made, duly authenticated, may be sent to said Supreme Court of the United States.

Dated this 11th day of December, 1912.

(S'g'd) MIGUEL GUERRA,
Solicitor for said Defendants.

51 In the District Court of the United States for Porto Rico.

(Filed February 27, 1913.)

No. 524. Equity.

JAMES R. NOBLE et al.
vs.
ELISA GALLARDO Y SEARY et al.

Assignment of Errors.

Now come defendants and appellants in the above entitled cause, and assign the following as errors committed by the Court aforesaid in the course of the proceedings in said cause in this Court:

1.

The Court erred in overruling the demurrer interposed by defendants to the bill of complaint filed by complainants in said cause.

2.

The Court erred in holding and deciding that complainants did not and have not a plain, adequate and complete remedy at law for the cause of action set forth in the bill of complaint.

3.

The Court erred in holding and deciding that plaintiffs were and are entitled to the relief prayed by said bill against said defendants.

4.

The Court erred in holding and deciding that complainants' bill is not without equity.

5.

52 The Court erred in holding and deciding that it had and has jurisdiction over and concerning the matters set forth in the bill of complaint herein, and to try, decide and determine the same.

6.

The Court erred in holding and deciding that equity had and has jurisdiction over and concerning the matters set forth in the bill of complaint herein, and to try, decide and determine said matters.

7.

The Court erred in assuming and taking jurisdiction over and concerning the matters with said cause and entering a final decree therein.

8.

The Court erred in holding and deciding that the cause of action herein is not barred and extinct by law and specially by Art. — of the Mortgage Law of May, 1880 and by Art. 134 of the Mortgage Law of May 26th, 1893, and Articles 1864, 1865, and clause 3 of Art. 1867 and 1840 of the Civil Code now in force in Porto Rico, and by Arts. 1963, 1864, clause 3 of 1966 and 1939 of the Civil Code of Porto Rico of 1889.

9.

That the Court erred in holding and deciding that complainants' cause of action is not barred because the same accrued more than thirty, twenty, fifteen and five years respectively prior to the time of the filing of this suit.

10.

The Court erred in overruling the plea interposed by defendants to the bill of complaint filed by complainants in said cause.

53

11.

The Court erred in denying the motion of said defendants to set aside the order pro confesso entered herein by complainants on the 11th day of July, 1912.

12.

The Court erred in holding that defendants had not been and were not diligent in filing their answer to the said bill of complaint and in holding that defendants' defense was and is not a meritorious one.

13.

The Court erred in denying defendants' motion to postpone and leave in abeyance the making and entering of the final decree herein until the matter of the Goenaga lien might be passed upon by the Court.

14.

The Court erred in holding that the lien which Ramon Ruiz Gandia gave to complainants' ancestor, William Noble, on the 22nd day of December, 1865, for the sum of 16,186 escudos was a mortgage upon the estate San Jose de Cacique referred to in complainants' bill of complaint.

Wherefore, the defendants respectfully pray that the final order and decree made in this case be reversed and set aside, and that an order be made by the Supreme Court of the United States dismissing the proceedings in this cause, or making any other disposition of the case in accordance with equity.

(S'g'd) MARTIN TRAVIESO, JR.,
Solicitor for Defendants-Appellants.

San Juan, February 27th, 1913.

54 In the District Court of the United States for Porto Rico.

(Filed Dec. 11, 1912.)

No. 524. Equity.

JAMES R. NOBLE et al.
vs.
ELISA GALLARDO Y SEARY et al.

Order Allowing Appeal, etc.

The defendant Elisa Gallardo y Seary, Estefanía Varonne, Celestina Gallardo y Varonne and Eva Gallardo y Varonne, by their counsel having on the 11th day of December, 1912, filed their Petition of Appeal in this case, it is hereby ordered: that an appeal to the Supreme Court of the United States from the final decree entered herein on the 10th day of December, 1912, be, and the same hereby is, allowed to said defendants; and that a certified transcript of the record and all proceedings herein upon which said orders and decree were made be transmitted to said Supreme Court of the United States, but that time for filing such transcript shall be enlarged until the 10th day of March, 1913.

It is further ordered: that the bond on appeal be fixed at the sum of six thousand ($6,000) dollars, the same to act as a supersedeas bond and also as a bond for cost and damages on appeal, and that said bond may be filed within sixty days from the date of the final decree herein, and may be approved by the Clerk of this Court.

Dated at San Juan, P. R. December 11th, 1912.

[SEAL.] (Signed) PAUL CHARLTON, *Judge.*

55 UNITED STATES OF AMERICA, *ss:*

To James R. Noble, William D. Noble, Sara Isabel Noble de McCormack, Arthur H. Noble, Josefa B. Noble and Maria T. Noble or their attorney of record, N. B. K. Pettingill, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the District of Porto Rico, wherein Elisa Gallardo y Seary, Estefania Varonne, Celestina Gallardo Varonne and Eva Gallardo y Varonne are plaintiff- in error and you are defendant- in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul Charlton, Judge of the District Court

of the United States for Porto Rico, this eleventh day of December, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States District Court for the District of Porto Rico.]

PAUL CHARLTON,
Judge of the District Court of the United States for Porto Rico.

[Endorsed:] 524. Equity. James R. Noble et al. vs. Eliza Gallardo et al. Citation. Filed Clerk's Office, United States District Court, December 11, 1912. Rafael Guillermety, Clerk of the Court, by Susanna Aldao.

On this eleventh day of December, in the year of our Lord one thousand nine hundred and twelve, the subscriber N. B. K. Pettingill, counsel of record for appellees, does hereby acknowledge service and delivery of a true copy of the within citation.

N. B. K PETTINGILL,
Counsel for James R. Noble et al., Appellees.

56 ***Bond.***

(Filed Feb. 10, 1913.)

Know All Men By These Presents, That we, Elisa Gallardo, Celeste Gallardo, Estefania Veronne Vda. Gallardo and Eva Gallardo, as principals, and Gabriel Guerra & Clemente Fernandez as sureties, are held and firmly bound unto James R. Noble, William D. Noble, Sara Isabel Noble de McCormick, Arthur H. Noble, Josefa B. Noble and Maria F. Noble, in the full and just sum of Six thousand ($6,000.00) dollars, to be paid to the said James R. Noble, William D. Noble, Sara Isabel Noble de McCormick, Arthur H. Noble, Josefa B. Noble and Maria F. Noble certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this tenth day of February, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a session of the District Court of the United States for Porto Rico, in a suit depending in said Court, between Elisa Gallardo, Celeste Gallardo, Estefania Veronne Vda. Gallardo and Eva Gallardo, Defendants and James R. Noble, William D. Noble, Sara Isabel Noble de McCormick, Arthur H. Noble, Josefa B. Noble and Maria F. Noble.

A final decree was rendered against the said Elisa Gallardo, Celeste Gallardo, Estefania Veronne Vda. Gallardo, and Eva Gallardo,
57 and the said James R. Noble, William D. Noble, Sara Isabel Noble de McCormick, Arthur A. Noble, Josefa B. Noble and Maria F. Noble having obtained a citation and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree

in the aforesaid suit, and a citation directed to the said James R. Noble, William D. Noble, Sara Isabel Noble de McCormick, Arthur H. Noble, Josefa B. Noble and Maria F. Noble citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Elisa Gallardo, Celeste Gallardo, Estefania Veronne Vda. Gallardo, and Eva Gallardo shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of:

(Signed) ELISA GALLARDO.
" CELESTE GALLARDO. [SEAL.]
" ESTEFANIA VDA. GALLARDO. [SEAL.]
" C. FERNANDEZ. [SEAL.]
" GABRIEL GUERRA. [SEAL.]
" EVA GALLARDO.

(Signed) MIGUEL GUERRA.
" MIGUEL GUERRA.
" MIGUEL GUERRA.
" MIGUEL GUERRA.
" MIGUEL GUERRA.
" MIGUEL GUERRA.

Approved by
(Signed) RAFAEL GUILLERMETY,
Clerk Dist. Court U. S. for P. R.

[SEAL.]

58 In the District Court of the United States for Porto Rico.

(Journal Entry, June 15, 1912.)

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

The hearing of the Plea filed by the Defendants in the above entitled cause, is set for Thursday, June 20th, 1912, at 10 o'clock A. M.

(Journal Entry, June 20, 1913.)

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

The demurrer and the plea filed by the defendants in the above entitled cause, are heard by the Court and after being duly con-

sidered, same are overruled, and said defendants have leave to renew same or to answer until Wednesday, July 10th, 1912, to which action of the Court, defendants duly object and except.

59 In the District Court of the United States for Porto Rico.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

(Journal Entry, November 7, 1912.)

The hearing of the motion to set aside the order pro confesso entered herein is set for Friday, November 8, 1912, at 10 o'clock A. M.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

(Journal Entry, November 9, 1912.)

The motion to set aside the order pro confesso entered herein, is duly heard by the Court and same is held in abeyance until Saturday, November 23, 1912, at 10 o'clock A. M.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

(Journal Entry, Nov. 27, 1912.)

All matters pending in the above entitled cause are set for Friday, November 29, 1912, at 10 o'clock A. M.

60 In the District Court of the United States for Porto Rico.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

(Journal Entry, November 30, 1912.)

The petition for intervention herein is heard by the Court, and after being duly argued, opposition thereto is withdrawn by counsel

for the defendants, and same is granted according to law, and the defendants are given twenty days to answer to the bill of complaint filed herein.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

(Journal Entry, December 3, 1912.)

The hearing of all matters pending in the above entitled cause are set for Saturday, December 7, 1912, at 10 o'clock A. M.

61 In the District Court of the United States for Porto Rico.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELISA GALLARDO Y SEARY et al.

(Journal Entry, December 11, 1912.)

Now on this day come the defendants herein, by their Attorney Miguel Guerra, and presents to the Court a petition of appeal in the above entitled cause, which same is ordered to be filed of record.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO et al.

(Journal Entry, December 11, 1912.)

Now on this day comes Miguel Guerra, Esq., attorney for the defendants herein and moves the Court to fix the amount of the appeal herein, which said motion after being duly heard and considered by the Court, it is ordered that a bond be furnished by the said defendants for the amount of six thousand dollars ($6,000), and that an order be prepared by said attorney investing the Clerk of this Court with sufficient authority to approve the bond herein mentioned in the absence of the Judge of this Court.

62 524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

Journal Entry, Feb. 10, 1913.

Now on this day come Elisa Gallardo, Celeste Gallardo, Estafania Verone Vda. Gallardo and Eva Gallardo, represented by their attorney, Miguel Guerra, Esq., and present a bond for the amount of six thousand dollars ($6,000.00), which said bond after being duly examined by me, as clerk of this court, and with sufficient authority for the approval of same, as per order of this court given on the 11th day of December, 1912, the same is hereby approved on this 10th day of February, 1913.

63 In the District Court of the United States for Porto Rico.

Filed February 27, 1913.

No. 524. Equity.

JAMES R. NOBLE et al., Complainants,
vs.
ELIZA GALLARDO Y SEARY et al., Defendants.

Præcipe for Transcript.

To the clerk of the above court:

You will please prepare a transcript of the record in the above cause, to be filed in the office of the Clerk of the Supreme Court of the United States, in the appeal taken by the above-named defendants, and include in the said transcript of record the following pleadings, proceedings and papers on file, to wit:

Bill of complaint.
Exhibit "A" for complainants.
Demurrer and plea to the bill of complaint, filed June 14th, 1912.
Order overruling demurrer and plea and granting leave to plead.
Order pro-confesso entered July 11th, 1912.
Motion to set aside order pro confesso.
Affidavit of merits.
Three documents filed in support of motion to set aside order pro-confesso.
Answer filed November 30, 1912.
Order denying motion to set aside order pro-confesso.
Motion postponing signing decree and order denying same.
Final decree.
Petition for appeal.
Assignment of errors.

Order allowing appeal.
Citation and return.
Supersedeas bond on appeal.
All journal entries made after June 14th, 1912.
Præcipe for transcript.

Said transcript to be prepared as required by law and by the rules of the Supreme Court of the United States, for the purposes aforesaid.

Very respectfully,
(Signed) MARTIN TRAVIESO, JR.,
Solicitor for the Defendants.

64 In the District Court of the United States for Porto Rico.

#524. Equity.

JOSEFA RUIZ DE NOBLE et al.
vs.
ELIZA GALLARDO Y SEARY et al.

I, Rafael Guillermety, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing typewritten pages numbered 1 to 63, inclusive, to be a true and correct copy of certain proceedings in the above entitled cause, as called for by the præcipe filed by the Counsel for the appellant, copy of which præcipe is hereto attached.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 28th day of February, A. D. 1913.

[Seal United States District Court for the District of Porto Rico.]

RAFAEL GUILLERMETY, *Clerk.*

65 [Endorsed:] No. 524. Equity. In the District Court of the United States for Porto Rico. Josefa Ruiz de Noble et al. vs. Eliza Gallardo y Seary et al. Transcript of Record.

Endorsed on cover: File No. 23,617. Porto Rico D. C. U. S. Term No. 141. Elisa Gallardo y Seary, Estefania Varonne, Celestina Gallardo y Varonne, and Eva Gallardo y Varonne, appellants, vs. James R. Noble, William D. Noble et al. Filed April 5th, 1913. File No. 23,617.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER

Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 141.

ELISA GALLARDO Y SEARY, *et al.*,
Appellants,

vs.

JAMES R. NOBLE, *et al.*

BRIEF FOR APPELLANTS.

FREDERIC R. COUDERT
HOWARD THAYER KINGSBURY,
Counsel for Appellants,
2 Rector Street,
New York City.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 141.

ELISA GALLARDO Y SEARY *et al.*,
Appellants,

vs.

JAMES R. NOBLE, *et al.*

BRIEF FOR APPELLANTS.

Statement.

This is an appeal by the defendants from a final decree of foreclosure and sale rendered by the District Court of the United States for the District of Porto Rico on December 10th, 1912.

The Bill of Complaint was filed on January 9th, 1908. It alleged that on *December 22nd, 1865,* one Ramon Ruiz Gandia, being the owner of an *undivided interest,* (the extent of which was not stated), in a certain sugar plantation called "San Jose Cacique," and being the *lessee* of the remaining interests therein from his co-owners, gave a mortgage, described in the Bill as a "con-

tract of refaccion", to one William Noble (complainants' ancestor) in the sum of 16,186 *escudos* ($8,093) covering the *future crops* of the plantation (Rec. p. 1).

A copy of the instrument is annexed to the Bill of Complaint. It recites and acknowledges an indebtedness of 16,186 escudos, for money supplied since 1863 "for *the payment of the lease* on the "San Jose Cacique Estate", and the debtor "binds himself to pay the above mentioned sum to his creditor Noble, *with the proceeds of the first crops* which may be ground from next January thereafter at the said San Jose Cacique Plantation". As security, "besides the general obligation which he hereby makes of all his property", he "*mortgages expressly and especially not only the canes which may be ground in the next crop by the 'Cacique' Plantation, * * * * * but also those which it may grind in the following crops* until the complete payment of the amount herein acknowledged" (Rec. pp. 4, 5).

It is this mortgage for $8,093, due nearly fifty years ago, given by a *part* owner and *lessee*, and expressly covering only future crops, which the judgment below directs to be foreclosed as a lien for $22,633 upon the *whole plantation*.

The Bill of Complaint further alleges that Ramon Ruiz Gandia became bankrupt, and that one of his co-owners, Ricardo Gallardo, the ancestor of the appellants, acquired title to the plantation, and in 1882 and 1883 recognized in writing the indebtedness and the lien of the mortgage (Rec. pp. 2, 3). It does not appear how Gallardo acquired the interests of the two remaining co-owners, Doña Amalia Seary and Don Jorge Seary.

The defendants interposed a plea of laches and

of the statute of limitations. The defence of laches was sustained, without passing on the question of limitation (reported as Succ'n of De Goenaga *vs.* Succ'n of Gallardo, 5 Porto Rico Fed. Rep. 10). The complainants appealed to this Court, which held that the equitable doctrine of laches, as developed by the English and American Courts of Chancery, should not be applied to the case under consideration, but that it should be determined by the Spanish law in force when the transactions took place. All questions as to the scope and effect of the mortgage and as to the Spanish law relating to prescription against mortgages and to subsequent recognitions, were expressly reserved. The decree was "reversed without prejudice", and the case "remitted to the District Court for further consideration" (Noble *vs.* Gallardo, 223 U. S. 65-67). Upon such former appeal there was no appearance or brief for the then appellees, who are the appellants in the case now at bar.

The defendants then (June 14, 1912) interposed a demurrer for lack of equity, coupled with a plea of the five, fifteen, twenty and thirty year periods of limitation (Rec. p. 6). Issue was tendered by the plea, but was not joined, and on June 15, 1912, the hearing of the plea was set for June 20, 1912 (Rec. p. 32). On that day the demurrer and plea were heard by Judge Charlton, and overruled without opinion, and defendants were granted "leave to renew same or to answer until Wednesday, July 10, 1912" (Rec., p. 7).

On or about July 8, 1912, defendants' counsel applied informally to Judge Charlton for an extension of time (Rec. p. 10). No action was then taken, but on July 11, 1912, an order was entered

taking the Bill of Complaint *pro confesso* (Rec. p. 8). Thereafter, an application was made by defendants to set aside this order, and for leave to file an answer and renew the demurrer and plea (Rec. p. 9). An affidavit of merits and a proposed answer were submitted (Rec. pp. 9-22). These papers are important here as giving officially authenticated copies of the instruments claimed to constitute the recognitions of the mortgage. This application was denied on November 30, 1912 (Rec. p. 22). The defendants then applied to suspend the entry of the decree until the determination of the Goenaga intervention, which presented a similar question (Rec. p. 23).

This intervention was subsequently decided by Judge Hamilton against the intervenors. A copy of his able opinion is printed as an Appendix to this Brief (*post* pp. 23-31).

On December 10, 1912, a final decree was entered fixing the amount due upon the mortgage at $8,093 (gold), with interest at 6% from January 1st, 1883, amounting to $14,540, making a total of $22,633, and directing a sale of the plantation unless the sum of **$30,348** should be paid in three months (Rec., pp. 24, 25). This last sum is approximately, but not exactly, the total of the aggregate of principal and interest, with the principal added in once more. It is impossible to find any basis for it in the Record.

From such final decree the present appeal was taken, the sale being stayed by a *supersedeas* bond (Rec. pp. 30, 31).

Jurisdiction of this Court.

The amount in controversy is sufficient to confer jurisdiction upon this Court under the provis-

ions of §244 of the Judicial Code. The decree finds the amount of the mortgage to be $8,093 gold, and the amount due to be $22,633.

A decree of foreclosure and sale is final for purposes of review.

See

Ray *vs.* Law, 3 Cranch, 179;
Whiting *vs.* Bank of the United States, 13 Peters, 6, 15;
Bronson *vs.* Railroad Co., 2 Black (67 U. S.), 524, 531.

Specification of Errors.

The errors assigned in the Court below (Rec., pp. 28, 29), and to be urged in this Court, may be summarized as follows:—

1. The Court erred in overruling the demurrer and in holding that the lien given by Ramon Ruiz Gandia to William Noble was a mortgage upon the San Jose Cacique plantation as a whole.

2. The Court erred in not sustaining the plea of the several statutes of limitation.

3. The Court erred in granting a decree of foreclosure and sale.

4. The Court erred in refusing to reopen the case and permit the defendants to answer, and in refusing to suspend the entry of the decree until the determination of the Goenaga intervention.

Brief of the Argument.

I.—The instrument in suit created merely a lien on the future crops of the San Jose Cacique Plan-

tation, and could not in any event bind the title of the co-owners of the property.

II.—The instrument in suit is not a *"refaccion"* contract, and gave no tacit or general lien on Gandia's property.

III.—The complainant's claim is barred by limitation or prescription and has not been kept alive by subsequent recognition.

IV.—The complainants were not entitled to the remedy of foreclosure and the action of the Court below in refusing to re-open the case was an abuse of discretion.

POINTS.

I.

The instrument in suit created merely a lien on future crops, and could not bind the title of the co-owners of the property.

The complaint alleges that the mortgagor was the owner of *an undivided interest* in the plantation, and was in possession and control of the whole, "by virtue of a lease of the remaining interest therein from his co-owners" (Rec. p. 1), three in number. It does not appear what his or their respective interests were. He naturally did not attempt to mortgage *their* interests, nor did he even

undertake to create any lien on his own undivided interest in the land; he merely agreed to repay the loan out of the proceeds of the next crop (which he, as lessee, would gather), and of the following crops, so far as might be necessary. This Court, on the former appeal, when the present appellants were unrepresented, pointed out that the Court below had "expressed doubts whether any of the instruments bound the land" (223 U. S. at p. 66), but did not examine or pass upon the question, saying that on the further hearing in the Court below the case should "be scrutinized with care, * * * with reference to the property covered by the lien" (do. p. 67). It is so obvious, upon the instrument itself, and upon the allegations of the Bill, that Gandia did not attempt to mortgage anything but the crops, and had nothing to mortgage but an undivided interest, that the case ought to have been decided and the bill dismissed upon this ground. Judge Rodey evidently saw the point, but apparently thought the defence of laches furnished a more convenient ground on which to dispose of both the main suit and the intervention at the same time; Judge Charlton must have either overlooked it or ignored it altogether; otherwise the decision is inexplicable.

For the convenience of the Court, we here give the instrument in full, indicating by italics the portions material to this discussion.

Mortgage Obligation.

In the Town of Naguabo, Province of Porto Rico, on the 22d day of December, 1865, before me, the undersigned public scrivener of this district and before the witnesses to be

mentioned, there appeared Don Ramon Ruiz, a resident of Loiza, of whose acquaintance I hereby certify, and stated: that by a liquidation made on this date between himself and Mr. William Noble, a property owner of this district, it showed that the *former owed the latter the sum of Sixteen Thousand one Hundred and Eighty-six Escudos (8093 pesos) which he has been supplying him up to this date since the year 1863 to the present inclusive for the payment of the lease on the "San Jose Cacique" Estate*, situated in the aforesaid town of Loiza, and by reason of not being able to grind the crop of this last year, for causes not unknown to Mr. Noble, he has not been able to pay off said account; therefore, and wishing to carry into effect this agreement in the way and form more suitable in law, he states: that he acknowledges and confesses to be real-y and effectively the debtor of the above mentioned Mr. William Noble, in the above mentioned sum, for the reasons given. And in as much as the delivery of the money is not made in my presence for the aforesaid reasons, the receipt thereof being true, he hereby renounces the exception of money not counted, of the new law, title one, fifth partida, which refers to same, and the two years granted by the same law to present said exception, which he hereby grants as if they had ellapsed. *He therefore binds himself to pay the above mentioned sum to his creditor Noble, with the proceeds of the first crops which may be ground from next January thereafter* at the said San Jose Cacique Plantation; and there resulting from the liquidation made by the appearing party hereto, Ruiz, with Mr. Jose Rufino Goenaga in November last, that the former was indebted to said gentleman in the sum of two thousand Escudos (1,000 pesos), this must be paid during the month of October of next year 1866,

thereby being cancelled that deed of refaccion, and Ruiz obliged not to execute any other agreement or deed with damage to this present one wherein there will be annulled and without effect whatever that which he may execute in the future; this without prejudice of deducing also the ordinary and indispensable expenses for the maintenance, and development required by the said Plantation by reason of the necessary refaccion and other expenses. *For the better security of the aforesaid,* besides the general obligation which he hereby makes of all his property hindering the special obligation, neither the special hindering the general, *the appearing party hereto mortgages expressly and especially not only the canes which may be ground in the next crop by the "Cacique" Plantation,* situated in the jurisdiction of Loiza as aforesaid, but *also those which it may grind in the following crops until the complete payment of the amount herein acknowledged;* allowing that the opportune annotation be taken of this instrument by the Register of Mortgages of this district, within the legal time of thirty days, of which obligation and its effects, I the Scriverner notified the parties hereto.

To the fullfilment of all that has been set forth in the present deed, the appearing party hereto affects his present and future property, with the clause which allows the courts to have same executed, executory contract, submission and renouncing all laws and rights in his favor, as well as that which prohibits the general law as to form.

It was thus stated by him and he signed same, being present witnesses and residents herein Don Roque Diaz, Don Joaquin Porrata and Don Ramon Muñoz, of all of which I hereby certify. Signed Rn. Ruiz Gandia—Scrol-

led: Jose Celestino Schroder. Public Scriverner.

(Rec. pp. 4, 5).

No subsequent recognition of this lien, which at most could attach only to an undivided interest, could possibly extend it to cover the whole title. It is not even so alleged in the Bill, which merely states that "the validity and existence of said indebtedness and its lien upon said plantation was so recognized by said Gallardo, as appears duly noted in said Registry in Book 2 of Loiza, folio 2, Estate No. 48, first inscription" (Rec. p. 2). The inscription referred to is not quoted nor are any further details of it given. Now a lien upon an undivided interest in a piece of property is, in a certain sense, a lien on the property, but it does not bind the *whole property*, so as to subject the whole to sale to satisfy the lien. If authority for so elementary a proposition be desired, it may be found in Shirras *vs.* Caig, 7 Cranch, 34, 48, per Marshall, C. J.

At the very most, the alleged "recognition", the language of which is not given by complainants, would only imply that Gallardo took the property subject to a lien upon the undivided interest therein formerly of Ramon Ruiz Gandia. It is not alleged, and nowhere appears, what was the extent of this undivided interest. The Bill of Complaint, though taken *pro confesso*, thus affords no basis for a decree of foreclosure and sale, either of the plantation as a whole, or of any definite interest therein. Moreover, by the Mortgage Law of 1869 only specifically described real property can be mortgaged, and crops cannot be mortgaged apart from

the land which produces them (Arts. 106, 108; Alcubilla, Diccionario de la Administracion Español, 5th Ed. Vol. 6, p. 88; now Porto Rico Rev. Stat. of 1911, §§ 6790, 6792). The earlier law, while less explicit on this point, proceeds upon the assumption that mortgages can be made only of specific real property (*bienes raices*). See Novisima Recopilacion, Lib. X., Tit. XVI, Ley 3, subd. 4.

By this test, the instrument in suit is not a mortgage at all.

In any event, since the instrument never affected, or purported to affect, the title to the plantation, or anything except future crops, the decree should be reversed and the Bill of Complaint dismissed. A decision upon this ground would render unnecessary any consideration of the other questions in the case, which will now be discussed, simply because the Court below appears to have attached some importance to them and to have decided them all erroneously.

II.

The instrument in suit is not a "refaccion" contract, and gave no tacit or general lien on Gandia's property.

The Bill of Complaint describes the instrument in suit as a "contract of *refaccion*" (Rec. p. 1), and the complainants have contended that it thereby constituted a general lien upon all Ramon Ruiz Gandia's property. The instrument does

not so describe itself. It describes the lien held by *Goenaga* as a "deed of *refaccion*" (Rec. p. 4); it reserves the right to incur the expenses required by the plantation for "the necessary *refaccion*"; and it refers to "the *general obligation* which he [Gandia] hereby makes of all his property" (Rec. p. 5), but it confines the *express lien* to the future crops. Neither by its terms, nor by operation of law, does it create any lien on Gandia's interest in the plantation itself.

A contract of "*refaccion*" is somewhat analogous to a mechanic's lien, being for money lent to pay for work done or materials furnished. Alcubilla defines the term "refaccionary creditor" (*acreedor refaccionario*) as "he who lends money or materials to construct or repair a building", and explains that, until certain modifications made by the Mortgage Law, such a creditor had a tacit legal mortgage upon "the value of *the said building*" in preference to other mortgage creditors, even prior in date (Dicc. Adm. Esp. 5th Ed. Vol. 1, p. 166). The general rule goes back to the *Partidas*, in which it is thus expressed.

> "If any one shall have received money "lent by another to equip or repair a ship, or "to build a house or other building, or to re- "pair it; those things, in which the money "shall have been laid out or expended, shall "be tacitly bound unto him who lent it."
>
> (Part. V, Tit. XIII, Ley 26).

By the Spanish Civil Code, this preferential lien attaches only to the property "which has been the *object* of the *refaccion*" (Art. 1923, subd. 3). In the translation published by the War Department in 1899, the word "*refaccion*" is

translated "agricultural loan", but is itself inserted in parenthesis to show that the translation does not, or may not, convey a precisely equivalent meaning. A French translation by A. Levi, published in 1890, is more exact and translates the phrase: "les biens * * * qui ont été l'objet de la *réparation*".

The present Civil Code of Porto Rico (Sec. 1824, subd. 4) follows the language of the War Department translation above mentioned, and in like manner retains the word "*refaccion*" in parenthesis, thus showing an intention to preserve the original meaning, and not to change or enlarge it.

It reads as follows:

> Sec. 1824. With regard to certain real property and rights on realty of the debtor, the following shall have preference:
>
> * * *
>
> 4. Mortgage and agricultural credits (*refaccionarios*) entered and recorded in the registry of property, with regard to the property mortgaged, or which had been the object of the agricultural loan (*refaccion*).

In the case at bar, the loan secured by the instrument in suit was not advanced for the construction or repair of any building, or even for the expenses of working the plantation; it was simply and expressly "for the payment of the lease". Thus it was not a "*refaccion*" contract, nor even an "agricultural loan"; it was simply an ordinary debt for money lent to a tenant to enable him to pay his rent.

In the court below some decisions of the Supreme Court of Spain in regard to "*refaccion*

contracts" were cited by the complainants, but in all of them there was present the element of building done or material furnished. They were fully considered by Judge Hamilton in his decision upon the Goenaga intervention, which is appended to this brief (see p. 27). Further discussion of this point would be merely useless repetition.

III.

The complainant's claim is barred by limitation or prescription and has not been kept alive by subsequent recognition.

The indebtedness was due in December, 1865, when the instrument in suit was made. This instrument gave to the creditor further security, but did not by its terms grant any further time to the debtor. The lien which it created on future crops could not be enforced until the crops came into existence, but if it created any lien on the property itself, such lien was enforcible immediately, and prescription at once began to run against such right of enforcement.

This suit was begun in January, 1908, more than *forty-three* years after the claim which it asserts accrued, if it ever did, and is therefore barred by prescription, whether the twenty or the thirty year period applies.

Under the present Civil Code the period applicable is twenty years, if the instrument be regarded as a mortgage, otherwise fifteen years.

"§1865. A mortgage action prescribes after "twenty years, and those which are personal "and for which no special term of prescrip- "tion is fixed, after fifteen years."

(Same as §1964 Spanish Civil Code.)

In the earlier law it was provided:

"Where, in connection with the obligation "there is a mortgage, or where the obligation "is mixed, personal and real, the debt is "barred by prescription in thirty years, and "no less."

(Novisima Recopilacion, Lib. XI, Tit. VIII, Ley 5;-Ley 63 of Toro).

Evidently recognizing the completeness of this bar, the complainants have sought to avoid it by attempting to set up certain alleged recognitions of the lien in 1882 and 1883. These are too indefinitely and insufficiently pleaded to tender a proper issue. The complainants merely refer to certain instruments and set up the pleader's opinion as to their legal effect; they do not plead the terms of the instruments themselves, so that the Court may reach its own conclusion. These allegations were evidently inserted in anticipation of the plea of prescription, instead of being reserved, as might more appropriately have been done, for a special replication, under the practice prevailing before the new Equity Rules. In fact, no replication at all was put in, so that on the record the plea of prescription stands admitted in point of fact, and challenged only on the ground of legal sufficiency. However, the pleadings are somewhat loose on both sides, and at the present stage of the case, a decision on a mere technicality of pleading

would doubtless be inappropriate. But a decision overruling the defence of prescription without any examination of the tenor, scope and effect of the alleged recognitions, especially after the express recommendation of this Court upon the former appeal (223 U. S. at p. 67), was more than merely inappropriate, it was manifest error and obvious injustice.

Upon the application for leave to answer it was made clear that the alleged recognition of 1882 was at most a mere recital, *by the recording officer*, of encumbrances apparently existing of record, and was not executed or assented to in any way by the new owner (see Rec., pp. 2, 15); and that the alleged recognition of 1883 was actually an acknowledgment of the payment of an indebtedness of approximately the same amount as the claim now in suit (see Rec., pp. 11, 14, 18). In any event, the instrument of 1883 contains no recognition or acknowledgment of the claim in suit, or any other specific claim, as then valid and subsisting either as a debt or a lien. It merely recites that, as to certain liens upon the property, referred to, but not described or identified, "Mr. Gallardo * * * has been paying the same on different installments fixed by mutual agreement with the creditors" (Rec., p. 18). This was also pointed out by Judge Hamilton in his opinion on the Goenaga intervention (*post*, p. 30).

The total insufficiency of the alleged "recognitions" was so clearly shown on the application to set aside the order taking the bill [redacted] *pro confesso*, by authenticated copies of public records, that it was more than a mere abuse of discretion—it was legal error—to proceed to a decree of foreclosure.

When a Bill is taken *pro confesso*, it is

> "taken to be true in all matters alleged with "sufficient certainty; but in respect to mat- "ters not alleged with due certainty, or sub- "jects which from their nature and the course "of the Court require an examination of de- "tails, the obligation to furnish proofs rests "on the complainant."
>
> See Thomson *vs.* Wooster, 114 U. S. 104, at p. 111, *quoting* Williams *vs.* Corwin, Hopkins Ch. 471;
>
> Central Railroad Co. *vs.* Central Trust Co., 133 U. S. 83, at pp. 90, 91.

In the case at bar, the Court below was expressly charged by the former decision of this Court with the duty of further investigation and consideration of the nature and effect of the alleged "recognitions," so vaguely and insufficiently pleaded. But instead of requiring the complainants to "furnish proofs" and at least submit to the Court the public records to which they referred, the Court proceeded to a final decree as a matter of course, and apparently ignored the showing made by the defendants of the manner in which the public records contradicted, instead of supporting, the allegations of recognition. Moreover, this is a case in which prescription is a peculiarly equitable and appropriate defence, in view of the condition of the public records, the death of the original parties to the transactions, the difficulty of proving the actual facts after this lapse of time, and the manifest probability that the claim in suit was long since paid.

IV.

The complainants were not entitled to the remedy of foreclosure, and the action of the Court below in refusing to reopen the case was an abuse of discretion.

In order to foreclose a mortgage in Porto Rico, the creditor must produce with his initial petition, "the instrument or instruments evidencing the credit, with a memorandum of their record", "a certificate issued by the registrar of property of a date subsequent to that of the maturity of the obligation, to the effect that the mortgage has not been cancelled, and is not awaiting cancellation, according to the day book", and a copy of the record of all other encumbrances upon the property and of conveyances to third persons.

> See Regulations for Execution of Mortgage Law, Art. 169;
> (Now §7266, Porto Rico Rev. Stat.)
> Also Mortgage Law, Art. 128;
> (Now §6812, Porto Rico Rev. Stat.)*

This is merely the present application of an ancient rule of Spanish Law, going back to the *Novisima Recopilacion*, which provides, in regard to mortgages, that, without their record in the Registry, "no judge shall have power to adjudicate upon such instruments, nor shall they be evidence for such purpose".

> See Nov. Rec. Lib. X, Tit. XVI, Ley 3, subd. 2.

*For convenience, the latest revision (1911) of the Statutes and Codes of Porto Rico is used for these citations.

Now embodied in substance in Mortgage Law, Art. 389; Porto Rico Rev. Stat. §7073.

The Mortgage Law of 1869 required the transfer of the old records to the new Register to make them fully effective.

"The records contained in the books of the "Registry on file in the offices of *Contadurias*, "*Anotadurias* or *Receptorias* of Mortgages, "shall have the effect they would have under "the laws in force prior to the date the Mort-"gage Law went into effect in the respective "islands beyond the seas, if said records shall "have been or are transferred to the modern "books of the registry."

Art. 397, Mortgage Law; §7081, Porto Rico Rev. Stat.

Such transfer was required to be made within a year, and, if not petitioned for within that time, "it shall not operate to the prejudice of third persons."

See last citation;
Also Regulations, Art. 449; Porto Rico Rev. Stat. §7546.

The right of transfer to the present records is still preserved, with the added safeguard of an appeal to the Insular Supreme Court.

When a registrar of property refuses "to record or to give its full effect to any document which may be presented to him for recording or for the annotation of the contents thereof, whether it be a deed, a decree, a mortgage, &c.," he shall set out the reasons for his refusal, and

serve notice of his action upon the interested party, who may then appeal to the Supreme Court, which must decide in a summary manner. He must also make an entry of the presentment and refusal, which entry is effective for four months.

See Act of March 1, 1902, now §2180 Porto Rico Rev. Stat.

In the case at bar, the Bill of Complaint alleges that the instrument sued on was duly "presented in the present Registry on the 9th day of April, 1906" (Rec. p. 2), but not that it was inscribed or recorded therein. On the contrary, it appeared upon the application to re-open the case, that the Registrar *refused* to make the transfer requested, on the ground that the instrument sought to be transferred only affected the *products* of the plantation, and did not constitute a lien upon the *property* (Rec. pp. 11, 13). He accordingly issued merely a "cautionary notice" (Rec. p. 13) good for four months under the Act of 1902, *supra,* or for a shorter period (60 days) if the provisions of the Mortgage Law be deemed to apply (See Mortgage Law, Art. 96; Porto Rico Rev. Stat. §6780). The effect of this notice, if any, has long since expired. Instead of pursuing their obvious remedy of an appeal to the Insular Supreme Court, the complainants elected to bring this suit. As it was not maintainable under the laws of Porto Rico, it was not maintainable in the Federal Court. Federal Courts of Equity follow their own *procedure,* but in matters depending on the effect of record of instruments affecting real property they are bound by the local law.

See Olcott *vs.* Bynum, 17 Wall. 44, 58.

The Bill of Complaint thus failed to show compliance with the necessary conditions precedent to the bringing of the suit, and, on the motion to reopen the case, it was shown that the conditions had *not* been complied with, and that complainants had neglected their legal remedy of an appeal to the Supreme Court of Porto Rico from the adverse decision of the Registrar.

It is, moreover, quite evident that defendants' failure to answer within the time fixed by the order of June 20th, 1912, was due to a very natural and excusable misunderstanding of the situation by their then attorney (Rec. pp. 10-12).

The action of a Trial Court in refusing to reopen a case after taking a Bill *pro confesso*, is usually to be regarded as a matter of discretion and not reviewable here. But in the present case, the defendants called to the Court's attention, before the entry of any final decree, the existence of several complete defences to the suit, supported by public records. In like manner, the action of the Trial Court, in refusing to suspend the entry of the final decree until the decision of the Goenaga intervention, worked grave injustice to the defendants. It is evident from Judge Hamilton's opinion that had the entry of decree been thus stayed, pending consideration of the effect of the alleged "recognitions", it would never have been entered at all, and complainants' claim would have met the same fate as that of the would-be intervenors. In view of all the circumstances, the action of the Trial Court, unexplained by any opinion, was so clear an abuse of discretion, that it may appropriately be reviewed here in connection with the necessary review of the manifest legal error in foreclosing the instrument in suit as a mortgage encumbering the plantation as a whole.

Summary.

1. The instrument in suit was not a mortgage of the plantation; by its terms it covered only future crops; it was made by the owner of an undivided interest and lessee of the rest; and it cannot bind the other interests.

2. Such instrument was not a "*refaccion*" contract, and created no general or tacit lien upon the property.

3. The claims of the complainants were barred by prescription, and have not been preserved by subsequent recognition.

4. The instrument in suit has not been recorded in the present Registry and cannot be foreclosed as a mortgage.

5. The refusal of the Court below to reopen the case was an abuse of discretion.

CONCLUSION.

The decree appealed from should be reversed and the Bill of Complaint dismissed.

Respectfully submitted this 23d day of November, 1914.

FREDERIC R. COUDERT
HOWARD THAYER KINGSBURY
Counsel for appellants,
2 Rector Street,
New York.

APPENDIX.

Opinion of Judge Hamilton.

IN THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

JOSEFA RUIZ DE NOBLE *et al.*, Complainant, *vs.* ELISA GALLARDO Y SEARY, *et al.*, Respondent.	**No. 524, Equity. San Juan.**

REFACCION AND LIMITATIONS.

N. B. K. Pettingill, Attorney for intervening petitioner.

Travieso & Yriarte, Attorneys for defendants.

HAMILTON, J.:

This is a petition in the nature of a bill of intervention, to which answers have been filed, and a plea of the statute of limitations has been interposed. It is now submitted upon the merits, the only evidence noted being documentary. It consists of exhibits and papers filed in the main case, and also certificate of Registrar of Property at San Juan of inscription of the finca of "San José Cacigue" in 1912, and of the entries in the old Anotaduria of Mortgages in 1864.

The facts of the case were examined by this court and are found in an opinion by Judge Rodey dated July 6, 1909.

It seems that in the year 1864 Ramon Ruiz Gandia was indebted to Rufino de Goenaga, ancestor of the intervenors, in the sum of six thousand and sixty-three and 35/100 dollars for which a notarial instrument was given, now claimed to be a refaccion. This was recorded in the Anotaduria de Hipotecas. It is claimed to recover the plantation of San José de Cacique. The actual ownership, however, of Gandia had been not of the whole but of an undivided interest, but he also leased the interest of his co-tenants. The same contract was continued for several years, and, while the bill alleges that it is still unpaid, the answer sets up that it has been paid. Said Gandia became bankrupt and in the course of the proceedings Ricardo Gallardo, ancestor of the defendants, bought the plantation. It is alleged on the one side and denied on the other that he recognized the lien now in question.

Several defenses are set up to the bill, among them that the instrument in question was not a mortgage of the land, that the claim has prescribed, and has been paid. There is no question that the original contract was recorded in 1864 as a refaccion mortgage, but at the time of opening new books of record a new Registrar in 1906 declined to authorize the transfer of the old record to the new. The original contract is not in evidence under the ruling of the court, but the renewal of the contract dated 26th of November, 1864, was properly recorded and therefore admitted in evidence and by recital seems substantially to incorporate the excluded paper.

1.—Was this a refaccion contract? The instrument of 1864 recites that that of October 31, 1862, was "a deed of refaccion", and the new instrument

recites that the "parties have agreed by common consent to extend by this document the first contract of refaccion signed on said 31 day of October, 1862, to the 31 day of August of 1865 next." The parties therefore considered the new instrument as a refaccion contract, the changes in the new instrument not affecting this part of the transaction. The contract says expressly that "the aforesaid Ruiz Gandia agreed to faithfully pay said sum (of six thousand and sixty-three and 35/100 pesos) with the crops manufactured by the said estate, and if not sufficient he shall pay with the sugar cane sprouts belonging to him and which by this contract are encumbered with the crops, and Ruiz shall also pay all the sums which Goenaga shall advance him thereafter . . . All the crop, that is to say sugar manufactured by the estate San José de Cacique, is hereby mortgaged, specially and expressly, and if it should not be sufficient, then the sugar cane sprouts of the said estate, in order that it shall be satisfied." And it continues that "Gandia cannot make any other agreement of refaccion with any other person during the time agreed upon in the present deed of extension and until the debt to Goenaga shall have been completely paid."

> "By *refaccion credit* is meant, that which arises from the *refaccion contract*, which is so called after the Latin verb *reficere*, to remake, to make over again, to bring into existence that which without the help of new works is going to perish.
>
> "Amongst the Romans, such credit gave only a right of action *in personam*, unless it was expressly stipulated that the property to be repaired or constructed should be mortgaged, except when the money advanced was to be used for rebuilding a building almost in

ruins, in which case, a tacit mortgage was recognized in favor of the creditors, which mortgage was called: *ne urbs ruinis deforme tur.*

"Laws 26 and 28, Title 13, Partida 5, merely declared that the 'refaccion creditor' should have a legal mortgage upon the house that had been rebuilt or repaired, but without determining how the execution of the contract was to be proven, nor the conditions that should appear in the contract, the only requirements being the receipt of the money for the work to be done and the investment of the amount in the said work."

Sentences of the Supreme Court of Spain, of Dec. 1, 1868, and of April 13, 1882.
2 Galindo & Escosura's Comentaries on the Mortgage Law, page 521.

So far as its express terms go the lien given is on the crop and rattoons, and in Porto Rico at least the rattoons hardly renew themselves for more than three or four years. "To the fulfilment of all that has been set forth in the present deed, the appearing party hereto binds his present and future property, with the clause which allows courts to have the same carried into execution . . . renounce all laws and rights in his favor," says the contract, and it also expresses the "understanding that the general obligation as to property is not to abolish or impair the special obligation, and on the other hand the latter is not to abolish or impair the former, as Goenaga can make use of either as he may deem best, the crop . . . is hereby mortgaged, specially and expressly."

2.—It is contended that the provision as to general obligation refers to a tacit mortgage which

the law gave to the refaccion creditors upon the real estate benefited. In this way it is claimed, that, while the terms of the contract refer to crop and rattoons only, it also expressly refers to the general law, which extends the lien to real property.

This has been held by the Supreme Court of Spain applicable to building a railroad track. 60 Jurisprudencia Civil, 909, Dec. 30, 1886. It has also been held that "there being conceded by the ancient legislation applied in the present case to the refaccion creditors a tacit mortgage and preferences upon the thing subject to the refaccion superior to all creditors not specially privileged." 63 Jurisprudencia Civil, 837, May 26, 1888.

So as to pipes furnished to a water company, wherein it was held that both the Roman law and the Partidas recognized the doctrine of tacit mortgage and preferential lien upon the "finca refaccionada" for all indebtedness "que hayan servido para comprar, fabricar, ó reparar nave, ó edificar casa, ó comprar tierra ú *otras cosas semejantes*".

3.—The cases cited go somewhat upon the principle of salvage in admiralty, giving a tacit lieñ upon vessels, houses or lands for the money used in building or preserving them. It cannot be said, however, that it is at all clear, that, when the contract on its face refers to making a crop, it is to be construed as applicable to the land, the more especially where, as in this case, the party making the refaccion contract was the owner of only an undivided interest in the land. It is true that he was in control of the whole property, but the lien recitals should probably be limited to the interest which he had, that is to say, ownership as to an undivided interest and leasehold as to the rest.

So far as appears, the leasehold must have long since expired.

"Law 3, Title XVI, Book X of the Novisima Recopilación, declared that in order to avoid frauds, suits and damages to purchasers or other persons having an interest in mortgaged properties, an entry should be made in the registry of mortgages of every instrument containing a special or express mortgage or encumbrance of real property, and provided at the same time that the mortgaged property should be designated therein by an expression of their names, area, location and boundaries; and that the term *real property* should be taken to include, besides houses, hereditaments and other rights in the realty, the annuities (censos) and other perpetual rights which might be the subject of an encumbrance or mortgage; and that in case the registration should be omitted, the said instruments should not be used as evidence at the trials or outside of the trial, for the purpose of foreclosing the mortgages.

From such legal provisions it must be inferred:

1.—That a general mortgage over all of the properties of the debtor had been left without force or effect, inasmuch as the registration thereof not being required, it was supposed that there could be no fraud, nor suits, nor damages to any purchaser or party interested in the land, which would not carry with it the burden of the mortgage, *when transmitted to a third party.*

2.—That inasmuch as the mortgaged properties had to be designated by an expression of their names, area, location and boundaries, *future goods or properties* could not be the subject of a mortgage, because they could not be designated in the manner provided by law.

3.—That *personal property* could not be the subject of a mortgage, because the law

referred exclusively to real property and to rights that are *real* in their nature.

4.—That this law introduced in our mortgage system the requirements of *specialty* and *publicity.*

2 Diccionario de Legislación Hipotecaria y Notarial, 67.

4.—It is alleged that the contract was accordingly noted in Book 19 of the old Anotaduria of Mortgages and that the debt was recited as a refaccion debt for advances made for agricultural purposes.

Under the Spanish law, as under the present Porto Rican law, the Registrar had semi-judicial powers, and if he declined to register an instrument an appeal lay from his decision. In this case, however, he registered the paper. There is no citation made showing that this bound any except the parties to the instrument.

5.—Furthermore, if this registration was to be regarded as a precedent, it is neutralized by a subsequent Registrar. When in 1912 it was sought to transfer the old registration above to the new Registry, the present Registrar declined on the express ground that the paper actually placed a lien only upon products to be manufactured and did not place any encumbrance upon the property. The Anotaduria, therefore, was said to have been given a wider scope than was proper, and therefore a mere cautionary notice, good for a limited time, was entered. No appeal was taken from this decision.

Whatever be the powers of the Registrar, however, they are not beyond re-examination by this court when rights are affected that are in suit

here. The Registrar's office is rather administrative than judicial. 80 Jurisprudencia Civil, 907, No. 210. It should be held to determine matters *prima facie*, and a decision by a Registrar may be persuasive, but in this instance there are two which come to opposite conclusions. They cannot be said to throw much light upon the subject or to control the case.

6.—The interval between the contract in 1864 and the petition of intervention in 1909 is thirty-five [*sic* in original; should be *forty-five*] years. It would not seem material whether the thirty years statute of repose or the twenty years statute covering mortgages should be held to apply. Either would be sufficient. It is true that the contract under the foregoing views was not a mortgage except to the extent of the undivided interest in the property. The remainder of the debt would be a personal obligation and barred under Section 1865 of the Civil Code of Porto Rico.

7.—The complainant, however, seeks to avoid the question of prescription by allegation of recognition of the claim in a deed of cancellation of mortgage executed by Gallardo on August 10, 1883. That instrument refers to liens, but does not necessarily include the claim now in suit. It says that "Gallardo being the owner of the property subject to the liens thereon, he has been paying the same in different instalments." The claims mentioned are said to be those according to the books of the old Anotaduria, and a certificate of the Registrar is that this old book contained a refaccion in favor of Goenaga. This is too general to amount to an express recognition of the claim at bar and stop the running of the statute of limitations or the principle or statute of repose.

8.—This case is not governed by what is called the Mortgage Law, as that was adopted after accrual of the rights now urged at bar. 64 Jurisprudencia Civil, 256. The law governing the Anotaduria de Hipotecas is much older. It goes back to the Novisima Recopilación, Title 16, Law 3. It was abolished by royal decree of February 28, 1879, but that did not affect the rights in this case.

It follows from the above discussion that the bill of intervention is not sustained by the proof and must be dismissed.

Signed PETER J. HAMILTON,
Judge.

San Juan, P. R., June 6, 1914.

UNITED STATES OF AMERICA,
District of Porto Rico, } ss.:

I, ANTONIO AGUAYO, Clerk of the District Court of the United States for Porto Rico do hereby certify that the foregoing is a true and correct copy of the original opinion in the above entitled cause as the same appears on file and of record in my office under date of June 6th, 1914.

WITNESS my official signature and the Seal of said Court, at San Juan in said district, this 8th day of June, A. D. 1914, and in the 138th year of the Independence of the U. S. of Am.

(SEAL)

ANTONIO AGUAYO, Clerk.
By: L. A. GROSS, Deputy.